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POINTS OF LAW

FOR

LAWYERS AND GENERAL READERS,

SUGGESTED BY

GUITEAU'S CASE.

EDITED BY

CHARLES E. GRINNELL,

EDITOR OF THE AMERICAN LAW REVIEW.

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CONTENTS OF THIS ADVANCE BUDGET

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PREFACE.

THE speedy publication of this collection of essays is a result of the growing public interest in the law of Guiteau's case, and of the general desire that his trial may be worthy of the profession of the law, and of the character of the American people.

C. E. G.

5 Court Street, Boston, Massachusetts,
1 October, 1881.

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CHALLENGE TO THE ARRAY.

§ 1. At Common Law. — At common law a challenge to the array lay to the body of jurors summoned upon the regular panel and the tales.[1] It was an exception to the whole of the panel, grounded upon the partiality or default of the sheriff, coroner, or other officer making the return.[2] There were two forms of this challenge: 1. *Principal.* 2. *To the favor.* The distinction be-

[1] Co. Litt. 156 *a*.

[2] Co. Litt. 156 *a*.

tween these is more easily stated than it is to determine in which class a given cause of challenge should be placed. A principal cause of challenge was grounded upon facts producing such a manifest presumption of partiality, that, being conceded or proven to be true, the challenge must be allowed. The array was vitiated by a presumption of law against its regularity. Lord Coke says of this challenge: "It standeth sufficient of itself, without leaving anything to the conscience or discretion of the triors."[1] This challenge, if true, called for the application of a rule of law, and therefore the trial of it was left to the court. The challenge to the favor, on the contrary, was grounded upon facts giving rise rather to a suspicion of partiality than to a positive presumption or belief. The question to be determined was one of fact, whether, in view of the circumstances under which the return was made, the officer would be improperly influenced in the performance of his duty. The trial of this challenge, therefore, was relegated to certain persons called triors, appointed by the court for this purpose, and the decision of it lay wholly within the "discretion and conscience of the triors."[2] This challenge seems to have been rarely taken at common law, and is now thoroughly obsolete; or perhaps it would be more correct to say that at the present time no distinction is recognized between these two classes of challenge to the array.

§ 2. Difference between the Mode of selecting Jurors at Common Law and under American Statutes. — In order to understand this subject it is necessary to keep in mind the radical difference which exists between the method of selecting jurors at common law, and that prescribed by modern American statutes. At common law, as is well known, the selection and summoning of the panel or array[3] of jurors for a particular term or session of

[1] Co. Litt. 156 *b*.

[2] Co. Litt. 156 *a*; Bac. Abr. Juries E.; Trials per Pais (ed. of 1725), p. 129. The following are stated to be grounds for this challenge: if either of the parties be subject to the distress of the sheriff; if the sheriff have an action of debt against either of them; if either be tenant to the sheriff. Ibid. But note the startling reason assigned by Lord Coke, why the array could not be challenged for favor in crown cases. "Where the king is party," said he, "one shall not challenge the array for favor, &c., because in respect of his allegiance he ought to favor the king more." Co. Litt. 156 *a*.

[3] These words are used in the books to designate the persons who are assembled to do jury duty at a particular term, or portion of a term, of court. The word "array" is somewhat antiquated, and is now scarcely ever used except in the expression which forms the caption of this article. The word "panel" has taken the place of it in modern times, and modern statutes frequently use the expression

court was confided almost wholly to the sheriff. He selected at discretion from the body of freeholders in a county, or from the body of citizens in a city, the persons whom he would have assemble for this purpose, and he brought them into court by his summons under the authority of a writ of *venire facias*, in civil cases, or a precept of the justices in criminal cases, either of which was simply a command to him to summon a certain number of good and lawful men to serve as jurors at the term or assize. There was no proceeding at common law similar to what we call the making of the jury-list. This is done under modern American statutes by county courts, county commissioners, boards of supervisors, judges of election, or by boards or commissioners specially created by statute to perform this duty. It consists of making a general list of the names of all persons residing in the county or other jurisdiction, qualified to do jury duty, or a specified number or proportion thereof. From this list the panel, who are to serve at the particular term or portion of a term, are drawn by lot, generally from ballots containing the list of names thus selected placed in a box or wheel. This constitutes the second step in the organization of a jury, and is properly called drawing the panel. A writ of *venire facias* is then directed to the sheriff, or other officer whose office it is to execute the processes of the court, under which he summons — not as at common-law a given number of good and lawful men — but only the persons who have been thus selected.

§ 3. Challenge for Partiality of the Summoning Officer. — When the panel or array is thus assembled in court, and is called for the purpose of impanelling a jury, it is liable to be challenged by a party to the cause to be tried. The usual ground of challenge at common law was the partiality of the sheriff, or other officer, who had selected and summoned the array. Many illustrations of this will be found in the old books. Thus, "if the officer return any juror at the party's domination; or that he may be more favorable to one party than the other; or if the array be returned by a bailiff of a franchise, and the

"challenge to the panel" instead of "challenge to the array." "And herein you shall understand," says Lord Coke, "that the jurors are ranked in the panel one under another; which order or ranking the jurie is called the array, and the verbe, to array the jurie; and so we say, in common speech, battaile array, for the order of the battaile." Co. Litt. 156 *a*. "A jurie," continues the great commentator, "is said to be impannelled when the sheriff hath entered their names into the panel, or little piece of parchment, *in panello assisae*." Co. Litt. 158 *b*.

sheriff return it as of himself; . . . if the sheriff be liable to the distress of either of the parties, mediately or immediately; or if he be his servant or officer in fee, or of robes; or his counsellor or attorney; or have part of the land depending on the same title; or if he have been godfather to a child of either of the parties, or either of them to his; or either of them have an action of debt against him; or if an action of battery, or such like, which imply malice, are depending between them."[1] In short, the opinion seems to have prevailed at common law that the sheriff ought to be as impartial as the persons returned;[2] but it is obvious that the reason of this rule has, for the most part, ceased under American statutes. With us the sheriff is little more than a messenger of the court, to notify a certain number of jurors to appear, in whose selection he has taken no part.[3] It is, therefore, immaterial whether he is partial or impartial with regard to causes pending for trial; and it has accordingly been held that an expression of opinion by the officer summoning the jurors, as to the merits of a particular case, or as to the guilt or innocence of a particular party, is not a good ground for challenging the array.[4]

§ 4. Consanguinity or Affinity of the Summoning Officer. — The reasons above stated exacted at common law the rule that consanguinity or affinity between the sheriff and the adverse party to the suit,[5] at least within the ninth degree,[6] was good ground for challenging the array.[7] This rule seems to have been adopted in some American cases, partly out of deference to ancient precedents, and partly from the consideration that, under the particular statute, the sheriff still retained some power in summoning the jury. He could, at least, omit to summon particular members of the panel as drawn, in which event it

[1] Bac. Abr. Juries I.; Co. Litt. 156 *a*; Trials per Pais (ed. of 1725), p. 123.

[2] Gilbert's Hist. C. P. 98.

[3] The reader will understand that I am making general statements simply, based upon an examination of the statutes. There are, doubtless, cases where the sheriff does take part in the drawing of the panel; but New Jersey seems to be the only State where the entire function of selecting the panel is still committed to him. See Rev. N. J. 1877, p. 533, § 13.

[4] *Friery* v. *People*, 2 Keyes, 424; 2 Abb. App. Dec. 215; 54 Barb. 319; *Ferris* v. *People*, 35 N. Y. 125; s. c. 31 How. Pr. 140; 48 Barb. 17; 1 Abb. Pr. N. S. 193.

[5] Co. Litt. 156 *a*; Bac. Abr. Juries E.

[6] 3 Bla. Com. 363; *Vernon* v. *Manners*, 3 Dyer, 319 *a* (13); *Oulton* v. *Morse*, 2 Kerr (N. B.), 77; *Vananken* v. *Beemer*, 4 N. J. L. 364.

[7] *Mounsen* v. *West*, 1 Leon. 88. See also *Foote* v. *Morgan*, 1 Hill (N. Y.), 654.

would be necessary to draw an additional panel, or to complete the jury in a particular cause, from talesmen who might be secretly assembled by himself for that purpose.[1] But it has been held no ground of challenge to the array, that the sheriff was cousin to the lessor of a plaintiff in ejectment; for the lessor is not a party in interest;[2] nor married to the sister of a person who was security for the costs, and who had aided the plaintiff with money to carry on the suit;[3] nor son of the prosecuting attorney in a criminal case.[4]

§ 5. Summoning Officer a Party to the Suit. — The reason which excluded the array when summoned by an officer who was related to the adverse party to the suit to be tried, operated, of course, more strongly where the sheriff was himself such adverse party; and this was always a ground of challenging the array at common law. And whether out of deference to ancient precedents, or considering the influence which the sheriff may still exert in the selection of the jury, as stated in the last section, or because, although he might not have any substantial power in this regard, under particular statutes, yet it would be an unseemly spectacle, and one calculated to impair public confidence in the administration of justice, to permit a sheriff to summon a jury to try a cause in which he was a party, — the American courts have generally adopted the common-law rule,[5] although some courts have held otherwise.[6] The reason of the rule extends to cases where the sheriff is manifestly interested in the event of a suit, although not a party to the record; and where this appeared, the coroner was ordered to summon tales jurors, to complete the panel of a struck jury.[7] It has been held that if a sheriff return a jury to try an indictment in which he is prosecutor, the objection can only be made by way of challenge; it cannot be made by motion in arrest of judgment.[8]

§ 6. Irregularities in selecting the General List. — Statutes which prescribe the manner of selecting the general

[1] *Munshower* v. *Patton*, 10 Serg. & R. 334; *Rector* v. *Hudson*, 20 Tex. 234.

[2] *Anon.*, 3 Dyer, 300, pl. (35); *Goodtitle* v. *Thrustout*, 2 Strange, 1023.

[3] *Murchison* v. *Marsh*, 2 Kerr (N. B.), 608.

[4] *State* v. *Cameron*, 2 Chand. 172.

[5] *Cowgill* v. *Wooden*, 2 Blackf. 322; *Cranmer v. Crawley*, 1 N. J. L. 43; *Woods* v. *Rowan*, 5 Johns. 133; *Munshower* v. *Patton*, 10 Serg. & R. 334.

[6] *State* v. *Judge*, 11 La. An. 79; *Prince* v. *State*, 3 Stew. & Port. 253.

[7] *People* v. *Tweed*, 50 How. Pr. 286. See also *Rex* v. *Johnson*, 2 Strange, 1000.

[8] *Rex* v. *Shepherd*, 1 Leach, C. C. 119.

list, as above described,[1] are generally treated as directory.[2] The primary object which they have in view is the just apportionment of jury duty among the citizens of the county or other jurisdiction, rather than the preservation of the rights of litigants. If the names of persons not qualified for this duty get inadvertently into this list, and if such names are drawn as members of the panel for a particular term, persons having litigation at that term have a complete remedy by challenging for cause any member of the panel suspected of being disqualified or partial. The general rule, therefore, is that irregularities in the general list constitute no ground for challenging the array.[3] This rule, however, is not of universal application. Thus, it has been held that where the legislature provides a particular mode for the selection of jurors, and repeals all conflicting laws, a selection made according to the provisions of the repealed law will be void.[4]

§ 7. Failure to make New Lists. — A statute directing the jury lists to be made from the tax returns once in every three years is merely directory to the officers in the discharge of their duty. Accordingly, if they fail to make the list as required by law, and the jury, in default of such list, is drawn from the old list, this does not vitiate the array, nor is it a cause of challenge to the polls. The jurors being qualified individually, the parties to the suit are not prejudiced. Such a statute is not intended to secure any benefit or privilege to the defendant. Its design is merely to regulate the procuring of jurors in such a way as fairly to divide the duty of jury service among the inhabitants of the county.[5]

§ 8. Failure to record the Lists. — The recording of the lists is necessary in order that the public may be apprised of the jurors selected, and that interested parties may have ample opportunity to investigate their qualifications. The fact that the recording of the list was wholly omitted would seem to afford reasonable ground for objection to a panel drawn from such list, and it was so held in two early cases in Indiana.[6] These cases, however,

[1] *Ante*, § 2.

[2] *Forsythe* v. *State*, 6 Ohio, 19; *Burlingame* v. *Burlingame*, 18 Wis. 285; *Colt* v. *Eves*, 12 Conn. 243; *Thomas* v. *People*, 39 Mich. 309.

[3] See *post*, § 11.

[4] *State* v. *Da Rocha*, 20 La. An. 356; *State* v. *Morgan*, 20 La. An. 442.

[5] *State* v. *Massey*, and *State* v. *Baldwin*, 2 Hill (S. C.), 379; *Rafe* v. *State*, 20 Ga. 630; *Perry* v. *State*, 9 Wis. 19; *Gettwerth* v. *Teutonia Ins. Co.*, 29 La. An. 30; *State* v. *Petrie*, 25 La. An. 386.

[6] *Mitchell* v. *Likens*, 3 Blackf. 258; *Mitchell* v. *Denbo*, ib. 259.

are not authority for the proposition that the list must be recorded within the time fixed by the statute. Indeed, by analogy to decisions previously noticed, it would seem to be clear that a strict compliance with the directions of the statute in this respect is not required. Accordingly, we find it established, where a statute directed that the list prepared by the board of county commissioners should be "forthwith delivered to the clerk of the District Court," that a failure to do so until several days after the selection is not such a "material departure from the forms prescribed by law in respect to the drawing and return of the jury," as constitutes a ground of challenge.[1]

§ 9. Informality in the Certificate of Selection. — The statutes generally require that the officers charged with the selection, having completed their duties, shall make a list of the jurors selected, and certify the same to the circuit or county clerk. Technical accuracy in the form of this certificate, however desirable, is not a matter upon which a party can insist, even in a criminal case. Thus, a list headed, "A List of Names of Jurors in the Jury Box of Ware County," followed by the names of such jurors, and concluding with, "Given under our hands and seals," &c., is sufficient, although it does not show that such list contains the names of all the jurors in the box.[2]

§ 10. Objection to the Officer who made the Selection. — It is no ground for challenging the array, that the jury list was prepared by a commissioner whose term of office had expired; for the acts of a *de facto* commissioner, if regular, will be binding.[3] So, under the old law, it was no cause of challenge that the array was made by a person two days after he had received his discharge as sheriff.[4] But where the law devolves the selection upon one officer, a selection by another officer will be good ground for challenging the array. Thus, where the law prescribed that the selection should be made by jury commissioners, and, such commissioners not having been appointed. the court administered to the sheriff the oath prescribed for such commissioners, and directed him to summon jurors for the term,

[1] *State* v. *Gut*, 13 Minn. 31.

[2] *Carter* v. *State*, 56 Ga. 463; *Brinkley* v. *State*, 54 Ga. 371. See also *Gardiner* v. *People*, 6 Park C. R. 157, 198; *State* v. *Clarkson*, 3 Ala. 378.

[3] *State* v. *McJunkin*, 7 S. C. 21; *Vance* v. *Com.*, 2 Va. Cas. 162; *Carpenter* v. *People*, 64 N. Y. 483; *Dolan* v. *People*, ib. 485; *State* v. *Ferray*, 22 La. An. 423.

[4] *Hoare* v. *Brown*, Cro. Eliz. 369. But compare *Anon.*, Dyer, 177 *b*, pl. (34).

it was held that the array ought to have been discharged.[1] So, if the commissioners fail to draw jurors for certain weeks of the term, the court cannot direct writs for the summoning of jurors.[2] So, it will be a good ground of such challenge if the duty of selecting jurors, devolved by law upon jury commissioners, is by them delegated to others.[3]

§ 11. Imperfections of the Jury List. — The preparation of a complete and perfect list of the persons qualified for jury duty is obviously very difficult, if not impossible, and is not required by law. It may be laid down as a general rule, therefore, that the mere fact that the jury list is incomplete, — that there are persons within the jurisdiction qualified to serve as jurors, and not exempt, whose names are not on it, — or that persons disqualified for jury service are included in it, will be no ground for challenging the array.[4] Nor is it *per se* evidence to support a challenge to the array, that a great disproportion exists between the number of persons of different religious beliefs upon the panel:[5] nor, a rich man being defendant, that there are very many poor men upon it.[6] Decisions are even found which go to the length of holding that a list valid upon its face is conclusive upon the prisoner as to its regularity.[7]

§ 12. List Incomplete through Fraud. — Suppose, however, a trial or series of trials is to take place, involving questions which excite great public interest. Suppose, also, that the officers of the State whose duty it is to make the jury list omit therefrom a large number of persons whose opinions or affiliations are such as would probably make them favorable to the accused. In other words, suppose the jury list to be incomplete through fraud; that this fact is set up as ground of challenge to the array, and that it is admitted by a demurrer. This was Daniel O'Connell's case.[8] O'Connell and others were indicted

[1] *Elkins* v. *The State*, 1 Tex. App. 539.

[2] *Shackleford* v. *The State*, 2 Tex. App. 385.

[3] *State* v. *Newhouse*, 29 La. An. 824.

[4] *People* v. *Tweed*, 50 How. Pr. 280; *Maffett* v. *Tonkins*, 6 N. J. L. 228; *Dolan* v. *People*, 64 N. Y. 485; *Foust* v. *Com.*, 33 Pa. St. 338; *Jewell* v. *Com.*, 22 Pa. St. 94; *Com.* v. *Walsh*,, 124 Mass. 32; *Woodsides* v. *State*, 2 How. (Miss.) 655; *Malone* v. *State*, 49 Ga. 210; *Brinkley* v. *State*, 54 Ga. 371; *Foster* v. *Speed*, 32 La. 34; *Sumrall* v. *State*, 29 Miss. 202; *State* v. *Neagle*, 65 Me. 468. But see *Compton* v. *Legras*, 24 La. An. 259.

[5] *Regina* v. *Mitchell*, 3 Cox, C. C. 1.

[6] Per Lefroy, B., Ibid., p. 30.

[7] *Gardiner* v. *People*, 3 Park. C. R. 157, 198; *State* v. *Allen*, 1 Ala. 442; *State* v. *Clarkson*, 3 Ala. 378; *State* v. *Brooks*, 9 Ala. 9.

[8] 11 Cl. & Fin. 155.

for conspiracy in the Irish Queen's Bench. A challenge to the array was interposed, on the ground that the list of jurors required to be made by the Irish Jury Act[1] had been illegally and fraudulently prepared by persons unknown, for the purpose of prejudicing the parties upon trial. To this challenge the Attorney-General demurred. It appeared that the special jury list, from which the panel in this case was struck, contained upwards of seven hundred names, but it was proved that the names of fifty-nine persons qualified as such jurors had been omitted from the list.[2] The matter was adjudged in favor of the Crown at the trial, and afterwards, before the full court, on motion for a new trial.[3] The case was next brought before the House of Lords upon this and other points, where the matter was again fully argued, and the decision of the court below affirmed. The opinions of the judges were, upon this occasion, requested for the assistance of the Lords. As to this challenge, the judges were unanimously of opinion that it could not be taken, for the cause alleged and admitted by the demurrer. This opinion was adopted by Lord Lyndhurst, L. C., and Lord Brougham; Lords Denman and Campbell were of the contrary opinion, while Lord Cottenham expressed no opinion. Although the Lords were thus divided, the opinion of the judges has been regarded as settling the question that a deficiency in the jury list is not a good ground for challenging the array.[4]

A decision of the former Supreme Court of New York may be profitably considered in connection with O'Connell's case. This case grew out of the abduction of Morgan, charged to have been done by members of the Masonic fraternity. A motion was made to quash an indictment, for the reason that the supervisors, in preparing the list of grand jurors for the county, had intentionally omitted the names of competent and qualified men, for no other reason than that they were members of the Masonic fraternity. This was held no ground for quashing the indictment.[5] But this decision does not go the length of O'Connell's case.

[1] 3 & 4 Will. IV. c. 91.

[2] The statute required the list of special jurors to be made from the general "Jurors' Book" by taking therefrom the names of all persons possessing the qualifications demanded by law of special jurors. 3 & 4 Will. IV. c. 91, § 24.

[3] 7 Irish L. 261. Perrin, J., dissenting.

[4] *Reg.* v. *Rea*, 16 Irish C. L. N. S. 428; *Brown* v. *Edmonds*, Irish Rep. 4 Eq. 630; *Hayes* v. *Reg.*, 2 Cox C. C. 105; *Fogarty* v. *Reg.*, Ibid.; *Reg.* v. *Burke*, 10 Cox C. C. 519.

[5] *People* v. *Jewett*, 3 Wend. 314, 320.

The Irish statute required, as we have seen, that the names of *all* persons possessing the qualifications required by law for jury service should be put upon the list. The statute of New York, under which the jury list in this case was prepared, required only that the supervisors of the county should prepare a list of three hundred names of persons to serve as grand jurors, being "such persons only as they know or have good reason to believe are possessed of the qualifications by law required of persons to serve as jurors for the trial of issues of fact, and are of approved integrity, fair character, sound judgment, and well informed." [1] The supervisors were unquestionably guilty of reprehensible conduct, if, as alleged, they rejected any man qualified for jury service for no other reason than that he was a member of the Masonic fraternity. Chief Justice Savage observed: "I do not approve of the exclusion by the supervisors of any set of men, on the ground of their belonging to any particular association or fraternity. A grand jury should be selected with a single eye to the qualifications pointed out by the statute, without inquiry whether the individuals selected do or do not belong to any particular society, sect, or denomination, social, benevolent, political or religious." [2] At the same time, the supervisors did all that the law required of them when they selected a list of jurors in number and qualifications as required by law. The discretion necessarily vested in the supervisors in making this selection could not be reviewed by the court. "Whilst those who are selected are unexceptionable," said Savage, C. J., "the fact that others equally unexceptionable are excluded, is no cause of challenge to the array." [3]

The grand jury, it must also be remembered, is merely an accusing body; and the liberty of the citizen does not require that nice inquiry should be made into the manner in which it has been organized. The main question is whether the prisoner has been justly accused or not, and an attack upon the legality of the grand jury is almost always a rogue's defence. Such attacks have been successful in American courts with scandalous frequency, and almost universally to the thwarting of public justice and the injury of society.

But with reference to the constitution of the body which is to try the prisoner, the question is entirely different. A common

[1] Laws of 1827, p. 312, §§ 1, 4. [2] 3 Wend. 320. [3] Ibid., p. 321.

sense of justice and fair play abhors a packed jury. When the statute requires that the names of all residents of the county possessing the qualifications demanded by law for jury service shall be put upon the list, and when the officers who make up the list deliberately omit therefrom all persons otherwise properly qualified, who, from known affiliations or opinions, are likely to be more favorable to the accused than those who are selected, a panel of jurors drawn from such a list ought to be dismissed and the officers punished. It is to be hoped that the time will never come when any American court, in which the question arises as to the constitution of a trial jury, will deliberately put its seal of approval upon the opinion of the judges in O'Connell's case. The law of this country is confidently believed to be that, while a challenge of an array will not be sustained merely because of a deficiency of the list from which they were drawn, yet the rule is otherwise where that deficiency is the result of fraud, or of manifest prejudice against prisoners about to be tried.[1]

§ 13. Irregularities in drawing the Panel. — (1) *Statutes Directory.* — Statutory provisions respecting the drawing of the panel are generally regarded as directory merely, and irregularities therein, unless plainly operating to the prejudice of the challenging party, form no ground for challenging the array,[2] as, for instance, where the names were drawn alternately for the two panels of grand and petit jurors ;[3] or where the officers failed to destroy the slips as drawn, containing the names of persons absent or deceased, and to draw others in their stead ;[4] or where the officers, having discovered an informality in the drawing, returned all the names into the box and began the drawing anew.[5]

Upon like considerations a challenge was disallowed upon the following facts, although presenting numerous informalities on the part of the officers charged with the drawing: The proper

[1] *People* v. *Tweed*, 50 How. Pr. 264; *People* v. *Dolan*, 64 N. Y. 485; *Maffett* v. *Tonkins*, 6 N. J. L. 228. This rule is enacted in many of our statutes. *Post*, § 13, subsec. 3.

[2] *Rafe* v. *State*, 20 Ga. 64; *State* v. *Williams*, 3 Stew. 454; *Friery* v. *People*, 2 Abb. App. Dec. 215, 230; s. c. 2 Keyes, 424; 54 Barb. 319; *Ferris* v. *People*, 35 N. Y. 125; s. c. 31 How. Pr. 140; 48 Barb. 17; 1 Abb. Pr. N. S. 193; *State* v. *Guidry*, 28 La. An. 630; *Pratt* v. *Grappe*, 12 La. 451; *State* v. *Miller*, 26 La. An. 579; *Mapes* v. *People*, 69 Ill. 523; *Wilhelm* v. *People*, 72 Ill. 468.

[3] *Dotson* v. *The State*, 62 Ala. 41.

[4] *Rolland* v. *Com.*, 82 Pa. St. 306, 321, Contra, *Jones* v. *State* (Sup. Ct. Ohio, 1851), 8 West. L. J. 508.

[5] *Lindley* v. *Kindall*, 4 Blackf. 189.

officers did not attend or witness the drawing; no minutes were kept of the jurors as drawn; no minutes of the drawing were signed or certified by any attending officer; some of the attending officers signed blank certificates, which the clerk filled up after the drawing; no copy of the minutes of the drawing were delivered to the sheriff; the ballots of the jurors drawn were delivered to the sheriff in lieu of a copy of the minutes, and from these he summoned the jury; the panel or list of jurors filed was not a copy of the minutes of the drawing. There was, however, no allegation of fraud or corruption against any of the officers who drew or summoned the jury, or certified to the list; neither was there any of injury or prejudice to the prisoner.[1] And there are many other cases where the irregularity might amount to a misdemeanor and subject the officers to punishment, and yet afford no ground for challenging the array.[2]

(2) *But Essential Provisions must be followed.* — It is otherwise where the essential provisions of such a statute have been palpably disregarded, as, for instance, where the officers took the names from the list according to their discretion, instead of drawing them by lot;[3] or assumed to reject names duly drawn as being names of persons unfit for jury duty;[4] or where fifteen jurors only were drawn instead of twenty-four;[5] or where names were put upon the panel by the clerk of the court at the request of the persons themselves, without being regularly drawn;[6] or where the names of the jurors were drawn from an open box in such a manner that the names upon each ballot were exposed to view before being drawn;[7] or where the clerk, having to draw two panels for different courts, drew the entire number of names at once, and then arbitrarily designated half of them to serve as jurors in one court and half in the other.[8]

[1] *Friery* v. *People*, 2 Abb. App. Dec. 215; s. c. 2 Keyes, 424; 54 Barb. 319.

[2] *Ferris* v. *People*, 35 N. Y. 125; s. c. 31 How. Pr. 140; 48 Barb. 17; 1 Abb. Pr. N. s. 193; *Gardiner* v. *People*, 6 Park. C. R. 155; *People* v. *Rogers*, 13 Abb. Pr. N. s. 370; *State* v. *Squaires*, 2 Nev. 227; *People* v. *Ah Chung*, 54 Cal. 398; *Pierson* v. *People*, 18 Hun, 239; *Cox* v. *People*, 19 Hun, 430; *Dolan* v. *People*, 64 N. Y. 485; *Claussen* v. *La Franz*, 1 Iowa, 226, 241; *State* v. *Seaborn*, 4 Dev. 305.

[3] *Jones* v. *State*, 3 Blackf. 37.

[4] *Anon.*, Brown (Penn.), 121.

[5] *Barker* v. *Steamer Milwaukee*, 14 Iowa, 214.

[6] *McCloskey* v. *The People*, 5 Park. C. R. 308. Such persons are termed non-jurors; they are mere interlopers, and, not being subject to challenge personally, their presence vitiates the whole panel. *Norman* v. *Beamont*, Willes, 484; Abbott, C. J., in *Rex* v. *Tremaine*, 7 Dowl. & Ry. 684, 687; s. c. 16 Eng. C. L. 318; s. c. *sub nom. Rex* v. *Tremearne*, 5 Barn. & Cress. 254; 11 Eng. C. L. 218.

[7] *Pringle* v. *Huse*, 1 Cow. 432.

[8] *Gardner* v. *Turner*, 9 Johns. 260.

(3) *Provisions of Particular Statutes.* — The policy of disallowing challenges to the array on account of informalities in drawing the panel has found expression in statutes in several of the States, which provide that challenges to the array, or to the panel, as it is sometimes called, shall be founded only on a material departure from the forms prescribed in respect of the drawing of the jury, or upon the intentional omission of the sheriff to summon one or more jurors drawn.[1] In Indiana "no challenge to the array shall be permitted because of any informality in the impanelling or selecting of a jury." [2] In Mississippi no challenge to the array is permitted except for fraud.[3] In Texas but one cause of challenge to the array is allowed, and that relates, not to the drawing, but to the summoning of the jury, and will be considered hereafter.[4]

§ 14. Persons who may conduct the Drawing. — The clerk, jury-commissioner, or other officer whose duty it is to draw the panel, is regarded for many purposes as the substitute of the sheriff at common law.[5] But they have no discretion, such as is vested in the sheriff at common law, as to what persons they will place upon the panel. On the contrary, as may be inferred from what has preceded, the duty is purely ministerial. It may, therefore, be performed by a deputy when legally appointed,[6] and a general statute authorizing clerks of courts to appoint deputies to perform the duties of such clerks is sufficient to render valid the drawing of a panel by such a deputy in the absence of the clerk, although the statute regulating the drawing of jurors makes no mention of such a substitution.[7] Nor is it any ground for objecting to the legality of the drawing that, besides the proper officers, another was in attendance and participated in it.[8]

Aliter, where he drew each panel separately, though both were drawn on the same day. *Crane* v. *Dygert*, 4 Wend. 675.

[1] Cal. Penal Code, § 1059; Comp. L. Nev. 1873, § 1947; Laws Utah, 1878, Code Cr. Proc. § 227; Miller, R. C. Iowa, 1880, §§ 2764, 4400; Stat. at Large, Minn. 1873, p. 1054, § 221; Ark. Dig. Stat. 1874, § 1902; Bullett's Ky. Codes (Crim.), p. 40, § 199. The grounds of challenge stated in such statutes are exclusive. *State* v. *Arnold*, 12 Iowa, 479; *State* v. *Raymond*, 11 Nev. 98.

[2] 2 Ind. Stat. 1876, p. 30, § 6.

[3] Rev. Code Miss. 1880, § 1694. See *Hare* v. *State*, 4 How. (Miss.) 189; *Thomas* v. *State*, 5 id. 20; *King* v. *State*, 5 id. 730.

[4] *Post*, § 16.

[5] *Gardner* v. *Turner*, 9 Johns. 260: *Jones* v. *State*, 3 Blackf. 37; *Mitchell* v. *Likens*, id. 258; *Mitchell* v. *Denbo*, id. 259.

[6] *State* v. *Gray*, 25 La. An. 472.

[7] *People* v. *Fuller*, 2 Park. C. R. 16.

[8] *Hunt* v. *Mayo*, 27 La. An. 197; *State* v. *Bohan*, 19 Kan. 28.

It seems that unindifferency, as it is termed in the English books, of the officer by whom a special or struck jury has been nominated, is no ground in England for challenging the array.[1] So, in this country, the fact that the clerk and auditor, by whom the list of such a jury was selected, had expressed an opinion as to the guilt of the defendant, based upon evidence which they had heard upon a former trial, was held no ground for challenging the array.[2] But fraud in the preparation of the list from which a special jury is struck will afford a good ground for such a challenge;[3] and in New Jersey, where the sheriff exercises powers with respect to the summoning of jurors, similar to those exercised by the sheriff at common law, it has been held a good ground for challenging the array of a special jury, that it was returned by a sheriff's deputy who had not taken the oath of office.[4] In New York it has been held that the statutory mode of obtaining a special jury, being a special proceeding, designed for a particular purpose, must be strictly pursued.[5]

§ 15. Time of conducting the Drawing. — Provisions of statutes respecting the time when the drawing shall take place are also treated as being merely directory to the officers.[6] But where the statute provided that the drawing should take place at least fourteen days prior to the commencement of the term, and the panel was drawn less than fourteen days prior to the holding of the court, it was held good ground for challenging the array; the purpose of the statute being, in the opinion of the court, to allow both the people and the accused fourteen days in which to examine the list, and investigate the character, qualifications, and bias of the persons drawn.[7] But a panel drawn more than two months prior to the holding of the court was held good under the same statute.[8]

§ 16. — Irregularities in Summoning the Panel. — (1) *Process of Summoning under American Statutes.* — It is unnecessary to enter into a description of the process of summoning jurors at common law, because the system established by American statutes has little resemblance to it. Without entering

[1] *Rex* v. *Edmunds*, 4 Barn. & Ald. 471. See, also, *Rex* v. *Despond*, 2 Mann. & Ryl. 406.

[2] *Webb* v. *State*, 29 Ohio St. 351.

[3] *Maffett* v. *Tonkins*, 6 N. J. L. 228.

[4] *Denn* v. *Evaul*, 1 N. J. L. 283.

[5] *People* v. *Tweed*, 50 How. Pr. 262, 263.

[6] *Wilson* v. *State Bank*, 3 La. An. 196, 198; *State* v. *Pitts*, 58 Mo. 556; *State* v. *Knight*, 51 Mo. 373.

[7] *Powell* v. *People*, 5 Hun, 169.

[8] *Crane* v. *Dygert*, 4 Wend. 675. But see *State* v. *Hascall*, 6 N. H. 352, 360.

into particulars, it will be sufficient to say that under our system a writ or precept is generally directed to the sheriff, in obedience to which he summons the jurors whose names have been drawn from the box or wheel. This writ is variously termed a *venire facias*,[1] a *venire*,[2] an order,[3] a precept,[4] a summons,[5] or simply process;[6] and in some States nothing in the nature of a writ issues at all, but the sheriff simply takes the list of names as drawn by the clerk, and notifies them to attend, as directed by law.[7]

(2) *Defects in Venire Facias no Ground of Challenge.* — Thus it is seen that the writ of *venire facias*, or other process by whatsoever name called, is, under the American system, of so little importance that it may be dispensed with altogether. Here, the important steps are the selecting and drawing of the jurors who are to serve; the act of summoning them is nothing more than the act of notifying them to attend, and the writ which issues to the sheriff for that purpose is little more than a memorandum of the names of those he has to summon, on which he may make a return, to the end that those who are thus notified, and who do not attend, may be punished for contempt. In point of substance and sense, it is wholly immaterial whether they attend *after* being summoned or *without* being summoned. It follows that objections to a panel on account of defects and informalities in the writ under which they were summoned, will not be listened to.[8]

[1] R. S. Me. ch. 106, § 9; G. S. N. H. 1867, § 7; G. S. Vt. 1863, ch. 37, § 2; G. S. Mass. 1860, p. 681, § 10; 1 Bright. Purd. Pa. Dig. 833, § 34; 2 R. S. Va. ch. 106, § 11. In Connecticut a "warrant" is issued to the town constable, directing the drawing. G. S. Conn. 1875, p. 433, § 6.

[2] R. C. Miss. 1880, § 1692; R. S. Ohio, 1880, § 5167; R. C. Md. 1878, p. 560, § 3; Comp. L. Nev. 1873, § 1054; Bush Dig. Fla. ch. 104, § 6; R. S. Wis. 1878, § 2535; G. L. Colo., 1877, § 1471; R. S. La. 1876, § 2127; Code Va. 1873, p. 1060, § 7.

[3] G. S. Neb. 1873, p. 643, § 660; Code Ala. 1876, § 4744; Battle Rev. N. C. p. 196, § 229 l.

[4] Code G. A. 1873, § 3931; Miller's R. C. Iowa, 1880, § 241.

[5] R. S. Ill. 1880, ch. 78, § 10; R. S. Mo. 1879, § 2786.

[6] Ind. Rev. 1876, p. 30, § 2.

[7] N. Y. Code Rem. Jus. § 1047; Comp. L. Ariz. 1877, § 2418; G. S. Ky. 1879, p. 574, § 6; Ark. Dig. St. 1874, § 3677; Gen. Laws Oreg. 1872, Civ. Code, § 930; Comp. L. Mich. 1871, § 5991; Comp. L. Kan. 1879, § 2976; Cal. Code Civ. Proc. § 225; Rev. N. J. 1877, p. 533, § 13; R. S. Del. 1874, ch. 109, § 8; St. Tenn. 1871, § 3991. In Texas this list must be under the seal of the court. R. S. Tex. 1879, § 3046.

[8] *State* v. *Cole*, 8 Hump. 627; *White* v. *Com.*, 6 Binn. 179; *Barton* v. *Murry*, 2 N. J. L. 97; *Sharp* v. *Hendrickson*, 2 N. J. L. 686; *Cox* v. *Haines*, ib. 687; *State* v. *Alderson*, 10 Yerg. 523; *Bill* v. *State*, 29 Ala. 34; *Hall* v. *State*, 51 Ala. 9; *Fields* v. *State*, 52 Ala. 348; *Aikin* v. *State*, 35 Ala. 399; *State* v. *Simmons*, 6 Jones L. 309; *Louw* v. *Davis*, 13 Johns. 227; *State* v. *Phillips*, 2 Ala. 297.

(3) *Failure to issue Venire Facias.* — Where the names constituting a panel have been regularly selected and drawn, and the panel thus selected and drawn have assembled in court, it is clear upon principle that it is wholly immaterial how they were induced to attend, — whether a formal writ issued, or whether they were notified by the sheriff or some other officer without the issuing of a formal writ. To dismiss a panel, or to arrest a judgment, for this reason, would exhibit a childish adhesion to mere form, reproachful to the administration of justice.[1]

Two or three courts have held the contrary,[2] but their decisions simply illustrate a blind and senseless adherence to ancient forms after the substance has wholly departed.

In New York, as will be seen by reference to the statutes just cited, no formal writ is necessary. It is there the practice for the district attorney to issue a "precept" to the sheriff, commanding him to summon the jurors whose names have been drawn. This precept is not the common-law writ of *venire facias*, nor a substitute for it. It is not necessary that it should be returned, and the failure to issue it affords no ground of objecting to the panel.[3]

(4) *Failure to make Return.* — The object of requiring the sheriff to make a return of the writ of *venire facias* is simply to identify those who have been summoned, and to enable the court to punish such of them as fail to attend.[4] Although, where the writ issues, a return ought regularly to be made thereon, even though not expressly required by statute, yet, for reasons already stated, the failure to make a return is only formal and will not afford ground for challenging the array.[5]

(5) *Defects in the Return.* — For stronger reasons, defects in the return will afford no grounds for such challenge,[6] though for

[1] *Bird* v. *State*, 14 Ga. 43; *State* v. *Crosby*, Harper Const. Rep. (S. C.) 90; *United States* v. *Reed*, 2 Blatchf. C. C. 435, 454; *Mayhor* v *State*, 1 Port. 265; *Johnson* v. *Cole*, 2 N. J. L. 193; *State* v. *Williams*, 3 Stew. 454; *Lyon* v. *Commercial Ins. Co.*, 2 Rob. (La.) 267; *State* v. *Folke*, 2 La. An. 744; *State* v. *Harris*, 30 La. An. 90; *State* v. *Perry*, Busbee (N. C.), 330; *Mackey* v. *People*, 2 Colo. 13, 17; *Trembly* v. *State*, 20 Kan. 116, 120; *McDermott* v. *Hoffman*, 70 Pa. St. 31; *Bennett* v. *State*, Mart. & Yerg. 133; *Samuels* v. *State*, 3 Mo. 68; *State* v. *Marshall*, 36 Mo. 400.

[2] *People* v. *McKay*, 18 Johns. 212, 217; *State* v. *Dozier*, 2 Speers, L. 211; *State* v. *Williams*, 1 Rich. L. 188.

[3] *People* v. *McCann*, 3 Park. C. R. 272; *People* v. *Cummings*, ib. 343; *People* v. *Robinson*, 2 Park C. R. 235 (overruling *McGuire* v. *People*, 2 Park. C. R. 148).

[4] *People* v. *Johns*, 24 Mich. 215.

[5] *Rolland* v. *Com.*, 82 Pa. St. 306, 322.

[6] *People* v. *Johns*, 24 Mich. 215; *Maples* v. *Park*, 17 Conn. 238; *State* v. *Stokely*, 16 Minn. 282; *Fellow's Case*, 5 Me. 333; *Com.* v. *Green*, 1 Ashm. (Penn.) 289. See also *Davis* v. *State*, 25 Ohio St. 369.

substantial defects, such as a failure to sign the return, it may be quashed, or the court may direct the officer to amend it.[1]

(6) *Time of making Return.* — By analogy to the rule relating to statutes which prescribe the time of drawing the names of the panel,[2] it has been held that the time prescribed by statute within which the sheriff should make return of the writ, is directory merely.[3] But a conviction in a capital case was reversed where it appeared that the return was not filed until the day upon which the defendant was sentenced, two days after the trial.[4] And this is not without reason ; for until the names of those summoned are returned, the prisoner has no opportunity to know definitely who are to compose the panel, or to prepare his challenges, or, through his counsel, watch the proceedings taken to procure additional jurors.

(7) *Jurors summoned but not returned.* — If jurors have been regularly summoned but not returned, and such jurors attend, they may, upon making affidavit to that fact, be sworn accordingly.[5]

(8) *Jury summoned by Improper Officers.* — Where the list of those to be summoned is selected and drawn, as already stated, it would seem, for reasons already suggested, unimportant whether they are summoned by the officer designated by statute, or by some other officer,[6] unless the circumstances raise a suspicion that some of them have been purposely returned not found. Thus, it has been held that, when the sheriff has been directed to summon a jury, he may do it himself, or cause it to be done by his deputies or by constables.[7] But this statement will obviously not hold good in case of the summons of a special *venire*, as practised in some of the states. We allude to jurisdictions in which the sheriff is directed to go out, in case of a deficiency of the regular panel, or where a special *venire* is awarded in a capital case, and bring in such persons as he sees fit. Here he exercises the power of selection confided to the sheriff at common law, and the character of the person by whom such an important duty is

[1] *Dewar* v. *Spence*, 2 Wheat. 211 ; *Com.* v. *Miller*, 4 Phil. 210 ; *Com.* v. *Green*, 1 Ashm. (Pa.) 289, 291 ; *Com.* v. *Chauncy*, 2 Ashm. 90 ; *Com.* v. *Parker*, 2 Pick. 549.

[2] *Ante*, § 15.

[3] *Mawry* v. *Starbuck*, 4 Cal. 274 ; *State* v. *Squaires*, 2 Nev. 226.

[4] *State* v. *Vegus*, 19 La. An. 105.

[5] *Patterson's Case*, 6 Mass. 486 ; *Anon.*, 1 Pick. 196.

[6] *Ante*, § 3.

[7] *People* v. *McGery*, 6 Park. C. R. 653.

performed is very material. But where the special *venire* consists of additional names drawn from the jury box or wheel, and the officer acts merely as a messenger to notify them to come into court, it is not, in the absence of circumstances creating a suspicion of an intentional omission to summon some of them, a matter of much moment by whom the duty is performed.[1]

(9) *Objections to the Persons summoned.* — Objections to the persons summoned, in the absence of fraud, such as we have already considered, are generally, if not always, made by challenges to the polls, and not by challenges to the array. Thus, it is not a good cause of challenge to an array brought in under a special *venire*, that some of the persons summoned are incompetent, there being no evidence of unfairness on the part of the summoning officer ;[2] nor that some of them are non-residents, if they were summoned through inadvertence merely ;[3] nor even that the sheriff had knowingly summoned persons who were witnesses for the prosecution, or who had sat as jurors upon a former trial of the same case.[4]

§ 17. Re-summoning Members of Quashed Panel. — The inutility of making challenges to the array, under the American system, is illustrated by a series of cases which hold that where the array has been challenged, the challenge sustained, the panel quashed, and a special *venire* or other order or precept issued to the sheriff to bring in new jurors, he may properly re-summon the members of the quashed panel,[5] unless the panel has been quashed because the wheel has been tampered with.[6]

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[1] By the Criminal Practice Act of California, § 337 (Penal Code Cal., § 1064), it is provided that when a panel is formed from persons whose names are not drawn as jurors, a challenge may be taken to the panel on account of any bias of the officer who summoned them, which would be a good cause of challenge to a juror. See *People* v. *Coyode*, 40 Cal. 586; *People* v. *Welch*, 49 Cal. 174; *People* v. *Rodrigues*, 10 Cal. 50. Undoubtedly this statute is nothing more than a declaration of a rule of the common law, under which the sheriff exercised both the office of selecting and summoning, and any bias in a juror which constituted a good cause to challenge him would, if it existed in the sheriff, be a good cause of challenge to the array. *Ante*, § 3.

[2] *Mitchel* v. *State*, 43 Tex. 517.

[3] *Gray* v. *State*, 55 Ala. 56 ; *Hall* v. *State*, 40 Ala. 698. See also *Hayes* v. *Reg.*, 10 Irish L. 53

[4] *Baker* v. *Harris*, 1 Winst. (N. C.) 277.

[5] *Caperton* v. *Nickel*, 4 W. Va. 173; *State* v. *Degania*, 69 Mo. 485; *State* v. *Owen*, Phill. L. 425 ; *State* v. *McCarry*, 63 N. C. 33 ; *Smith* v. *State*, 4 Nev. 227.

[6] *Kell* v. *Brillinger*, 84 Pa. St. 276.

INSANITY AS A DEFENCE.

In the twenty-first year of the reign of Henry VII. the Year Book tells us that "A man was arraigned for the murder of a child, and it was found that at the time of the murder the felon was not of sane memory, by which it was determined that he shall go free, *quod nota bene*," &c.[1] This is perhaps the oldest adjudication upon the question of the legal responsibility of an insane person; but it goes no further than his responsibility: it does not tell us anything of the tests by which the question of his insanity is to be determined, nor of the evidence which is to be required to establish it. It settles, however, the common-law rule, that a man is not to be legally punished for an act done by him while insane.

It may be that the courts and juries of those days, without settled tests, arrived at the practical point of the moral responsibility of the accused in as satisfactory a way and with as much correctness as can be done now, when the issue is in most places to be decided under technical rules which leave little to the general discretion of the jury. But with the growth and development of the law in other directions the law on this point has grown, and two questions have been evolved on which the whole matter hangs, and which have been answered in many different ways. These two questions are: —

I. What insanity will constitute an excuse for an unlawful act?

II. What is the rule of evidence as to the proof of the insanity?

At a time when such questions are prominent, and when there seems to be a disposition to approve or urge such a construction of the law, if it be possible, as will make insanity valueless as a defence, at least, in one case, it may be useful to consider what is the true answer of the law to each of the questions proposed. The honor of the nation is concerned that it should not directly or indirectly deprive any particular man, on account of the nature of his offence, and the indignation excited by it, of any protec-

[1] Y. B. 21 H. VII. 31 *b*.

tion which the law, justly construed, affords to others in like position. It is desirable to consider the law fairly and candidly, and to see what is the just measure of the immunity extended to the insane criminal.

I. — What Insanity will constitute a Defence in Criminal Cases?

There appears to be no question that at common law, as now chiefly by statute, insanity was not only a defence to the indictment, but, if it existed at the time of the proposed arraignment, trial, sentence, or execution of a criminal, would prevent further proceedings. The reason, of course, was that one who is *non compos mentis* is supposed not to be advised how to plead, not to be able to defend himself, and (in the case of judgment or execution of sentence) it is supposed that if he were of sound mind he might urge some reason why judgment or execution should not take place. It is somewhat curious that the only exception to the immunity of a lunatic should be found in reference to these matters, for his insanity would seem to be at least as strong a reason against trying him as against punishing him. But by the 33 H. VIII. c. 20, it was enacted that if one accused of high treason should become insane after the commission of the alleged offence, he might be tried in his absence, and, if found guilty, might be executed. This act, however, was repealed by 1 & 2 Phil. & Mary, c. 10, and seems to constitute the only exception to the general exemption from responsibility for their acts, which attaches to lunatics.

There is no trace of any very early discussions of the question of what insanity will be a defence. Fitzherbert defines an idiot, who, of course, is one of the irresponsible persons, as follows: "And he who shall be said to be a sot and idiot from his birth is such a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, &c., so as it may appear that he hath no understanding of reason what shall be for his profit or what for his loss; but if he hath understanding, that he understand and know his letters, and read by teaching or information of another man, then it seemeth he is not a sot or a natural idiot." [1] This definition only includes

[1] F. N. B. 233 B.

idiots, and is criticised by Lord Hale as being too narrow, but it is interesting as showing an early attempt to set up a standard in law for the measuring of mental capacity. Before long there came to be much elaboration in the classification of *non compotes mentis*, and the law substantially as it is in most places now was laid down at a comparatively early date.

It is in Lord Hale's Pleas of the Crown that we first seem to reach settled law. He divides *dementia* (under which name he includes all defects of the mind) into three classes: —

1. *Idiocy*, or *fatuity à nativitate vel dementia naturalis.*

2. *Dementia accidentalis vel adventitia*, which includes what we call insanity.

3. *Dementia affectata*, which includes drunkenness or any similar affection produced by the use of drugs and the like.

The second of his great divisions, *dementia accidentalis*, he divides into two classes: —

(1.) Partial insanity: *quoad hoc vel illud insanire.*

(2.) Total alienation of the mind.

Besides these, he makes another and different division of *dementia accidentalis* into —

(1.) Permanent or fixed madness (phrenesis).

(2.) Interpolated by certain periods and vicissitudes (lunacy).

Of *dementia affectata*, he says that it is only a defence in two cases: —

(1.) If by unskilfulness of a physician or contrivance of an enemy one eat or drink what causes temporary or total lack of mind.

(2.) If drunkenness be so long a habit as to permanently affect the mind.[1]

Though these divisions are chiefly matters of curiosity now as to their phraseology, yet they certainly have been in substance adopted by the law; and Lord Hale's rules of responsibility drawn from them are, in a different form, largely followed. He holds that a partial insanity will not be a defence of itself, that the mere showing the existence of partial insanity is not enough; and with some hesitation he gives this rule for a test: "Such a person as, laboring under melancholy distempers, hath yet ordinarily as great understanding as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or fel-

[1] 1 Hale P. C. 29 *et seq.*

ony."[1] Doubtless the test of "a child of fourteen years" is vague; but if we take the modern formula, and say that the accused may be found guilty if he could appreciate the nature and quality of his act and knew that it was wrong, we are probably following the rule that Lord Hale meant to lay down. So as to a person subject to attacks of insanity with lucid intervals, the law is now as Lord Hale laid it down, that the act, if done in a lucid interval, is a crime. At any rate, it is here that we first find a careful consideration of the subject, and it affords a starting-point from which the variations of the law in later cases may be reached by a more or less regular evolution.

In 1725, in the case of Edward Arnold,[2] who was indicted for shooting at Lord Onslow, the defence of insanity was set up, and here we seem to get the first intimation of the rule which makes a knowledge of right and wrong the test of responsibility set forth clearly. Mr. Justice Tracy, in his charge to the jury, says: "If he [the prisoner] was under the visitation of God, and *could not distinguish between good and evil*, and did not know what he did, though he committed the greatest offence, yet he could not be guilty of any offence against any law whatsoever." Further on he says: "If you believe he was sensible and had the use of his reason, and understood what he did, then he is not within the exemptions of the law." Though a court at the present day would probably consider this charge at all events misleading, yet it was long the custom to charge much in this way, and it cannot be said that the law as stated there is erroneous. It is, however, more accurately stated by the Solicitor-General (Charles Yorke), *arguendo*, in the case of Lord Ferrers,[3] who was tried for murder in 1760. In this case the Solicitor-General stated the test was this: "Was he [Lord Ferrers] under the power of it [insanity] at the time of the offence committed? Could he, did he, at that time, distinguish between good and evil?" This limitation of the power of distinguishing between good and evil to the act itself brings the test to almost exactly that given by the judges in *McNaughten's Case*, which we shall consider later. The law in general as to insanity was stated by the Solicitor-General to be that "If there be a total permanent want of reason, it will acquit the prisoner. If there be a total temporary want of it when the offence was committed,

[1] 1 Hale P. C. 30. [2] 16 How. St. Tr. 695. [3] 19 How. St. Tr. 866.

it will acquit the prisoner; but if there be only a partial degree of insanity mixed with a partial degree of reason, not a full and complete use of reason, but (as Lord Hale carefully and emphatically expresses himself) a competent use of it sufficient to have restrained those passions which produced the crime; if there be thought and design; a faculty to distinguish the nature of actions; to discern the difference between moral good and evil, — then upon the fact of the offence proved the judgment of law must take place."

The next important case after Lord Ferrers' certainly tended to depart from the old rule of a knowledge of right and wrong as the proper test of sanity, though counsel showed the usual reluctance to formally opposing the authorities and made the usual attempts to distinguish opposing cases. This was the trial of James Hadfield [1] for high treason in shooting at the king; and while the chief matter of interest is in the speech of Erskine for the defence, which cannot strictly be considered as authority, yet the case has always attracted much attention. Erskine proposed *delusion* as the true test of criminal responsibility, and states the law to be that (apart from idiots and raving maniacs) he alone is excused "whose whole reasoning and corresponding conduct, though governed by the ordinary dictates of reason, proceed upon something which has no foundation or existence."

But it cannot be said that the rule here stated by Erskine is, as he laid it down, the law. In *Regina* v. *Oxford*,[2] Lord Denman, C. J., expressly says that statements of counsel are not to decide the matter, and he then states what may be said to be the rule now in England. "The question is, whether the prisoner was laboring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious, at the time he was committing the act, that it was a crime." Shortly after Oxford's trial, however, arose *McNaughten's Case*,[3] on the trial of which Lord Chief Justice Tindal instructed the jury that "the question to be determined is whether at the time the act in question was committed the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act." The case gave rise to a discussion in

[1] 27 How. St. Tr. 1282. [2] 9 C. & P. 525. [3] 10 C. & F. 200.

the House of Lords on the question of insanity in its relation to such crimes, and as a result of the debate five questions were submitted to the judges, four of which bear directly upon the matter which we are considering. These questions were as follows: —

"1st. What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crimes, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?"

"2d. What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?"

"3d. In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?"

"4th. If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?"

These questions cover the whole ground as to the nature of partial insanity as a defence, and the answers of the judges are highly important and interesting as a solemn expression of opinion by the highest legal authorities, on this matter, of England. Mr. Justice Maule (who answered separately) said, in answer to the first and fourth questions, that "to render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should, according to the law as it has long been understood and held, be such as rendered him incapable of knowing right from wrong." To the second question he replied that "guilty or not guilty" was the only question necessarily left to the jury, but that the judge might submit such other questions as in his discretion the evidence made proper. To the third question he answered that there are no terms which are required by law, but they should be not inconsistent with the law as laid down in his answer to the first question. Lord Chief Justice Tindal, speaking for himself and the other judges (except Mr. Justice Maule), said, in answer to the first question, that the accused is "punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting

contrary to law." In answer to the second and third questions, they laid down a rule the terms of which have become so familiar in the law that they may be said to constitute the regular formula in places where the theory of responsibility held by the English courts is the law. He said that there was no exemption from responsibility unless, "at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." This the judges considered the more accurate way of putting the question to the jury, though they thought that the more general form, as used by Mr. Justice Tracy in *Arnold's Case* and laid down by the Solicitor-General in *Lord Ferrers' Case*, was rarely, if ever, misleading. To the fourth question the Lord Chief Justice replied that the accused "must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real." The law as here laid down is supported by the highest authority, and has been followed in many States in this country. It is, after all, but a more precise and accurate statement of what was without doubt intended by Lord Hale and Mr. Justice Tracy. Lord Hale's test of the understanding of a child of fourteen, and Mr. Justice Tracy's, of a general knowledge of right and wrong, were only a broad way of stating the same thing; and it can be easily seen from what they say that had it been shown that a prisoner having such understanding and knowledge, in general, was nevertheless unconscious of the wrong of a given offence committed, they would not have held him responsible. And such is the law of England.

In the United States we find the greatest divergency of opinion. There may be said to be a tendency toward leaving the question more to the discretion of the jury than it is under the English rule, though many States have adopted that rule. In some of the States the question is left to the jury in a general way as to whether the insanity caused the crime; in others the defendant's knowledge of right and wrong is made the test, as in England; while in still others the test of the knowledge of right and wrong is coupled with an inquiry as to the power of the defendant to control his actions. These three classes, of which the first is probably increasing, form a fair division of the different States.

The right and wrong test may be said to prevail in New York,[1] in spite of some decisions which go further in recognizing "moral insanity," so called. The same rule prevails in California,[2] New Jersey,[3] Wisconsin,[4] Missouri,[5] Tennessee,[6] Texas,[7] Alabama,[8] Virginia,[9] Louisiana,[10] North Carolina,[11] Maine,[12] Georgia,[13] Mississippi,[14] Delaware,[15] and Nebraska.[16]

To the test of a knowledge of right and wrong is added an element of the power of the accused to control his acts and apply his sense of the moral nature of his act, in Massachusetts,[17] Pennsylvania,[18] Ohio,[19] Iowa,[20] Minnesota,[21] and Kentucky.[22]

The question of the defendant's responsibility is left in broad general terms to the jury in Illinois,[23] Indiana,[24] Kansas,[25] Michigan,[26] and New Hampshire.[27]

[1] *Willis* v. *The People*, 32 N. Y. 715; *Freeman* v. *People*, 4 Den. 28; *People* v. *Montgomery*, 13 Abb. Pr. N. S. 207; *Wagner* v. *People*, 2 Keyes, 684. The inferior courts have not always adhered to the rule as given above. See *People* v. *Kleim*, 1 Edm. 13; *People* v. *Divine*, Ibid. 594; *McFarland's Trial*, 8 Abb. Pr. N. S. 57. The first two cases were in Oyer and Terminer and the last in the General Sessions.

[2] *People* v. *Coffman*, 24 Cal. 230.

[3] *State* v. *Spencer*, 1 Zabr. 196.

[4] *State* v. *Wilner*, 40 Wis. 304.

[5] *State* v. *King*, 64 Mo. 591, where the court expressly states that "moral insanity" is no excuse for crime.

[6] *Dove* v. *State*, 3 Heisk. 348.

[7] *Thomas* v. *State*, 40 Tex. 60.

[8] *Powell* v. *State*, 25 Ala. 21.

[9] *Boswell's Case*, 20 Gratt. 860.

[10] *State* v. *Burns*, 25 La. Ann. 302.

[11] *State* v. *Haywood*, Phil. L. R. 376.

[12] *State* v. *Lawrence*, 57 Me. 574.

[13] *Anderson* v. *State*, 42 Ga. 9.

[14] *Kelly and Little* v. *State*, 3 S. & M. 518.

[15] *State* v. *Pratt*, 1 Houst. Cr. 249.

[16] *Wright* v. *People*, 4 Neb. 407.

[17] *Commonwealth* v. *Rogers*, 7 Met. 500. It is somewhat doubtful from the opinion whether the court meant, in speaking of lack of control, anything else than a state of insane frenzy without a comprehension by the lunatic of what he was doing, but on the whole the charge seems to go rather farther than that.

[18] *Ortwein* v. *Commonwealth*, 76 Pa. St. 414; *Brown* v. *Same*, 78 id. 122; *Sayres* v. *Same*, 88 id. 291.

[19] *Blackburn* v. *State*, 23 Ohio St. 146. The court added to the right and wrong test the question: "Was the accused a free agent in forming the purpose to kill?"

[20] *State* v. *Felter*, 25 Iowa, 67.

[21] *State* v. *Gut*, 13 Minn. 341. The further question here was as to whether the defendant had "mental power sufficient to apply that knowledge [*i.e.* of right and wrong] to his own case."

[22] *Smith* v. *Commonwealth*, 1 Duv. 224.

[23] *Hopps* v. *People*, 31 Ill. 385, where the jury are to acquit if the affection of insanity "was the efficient cause of the act," and the prisoner "would not have done the act but for that affection."

[24] *Stevens* v. *State*, 31 Ind. 485. The proper question for the jury here was held to be whether the accused had "mental capacity to commit the crime charged."

[25] *State* v. *Crawford*, 11 Kan. 32. A *dictum* in this case is to the effect that "no act which is the result of insanity, total or partial, ... can be a crime."

[26] *People* v. *Garbutt*, 17 Mich. 9. The court held it no error to refuse a request to charge as in *Hopps* v. *People*, *supra*, because they were not satisfied that other portions of the charge did not cover the ground, indicating that such a charge would have been proper.

[27] *State* v. *Bartlett*, 43 N. H. 224; *State* v. *Jones*, 50 id. 364.

The United States courts in general have adhered to the test of a knowledge of right and wrong.[1]

It appears from this that in sixteen States the accused is held responsible, if he knew what he was doing, and knew it to be wrong; in five States the question is left to the jury in substantially the same way that it was in *People* v. *Hopps*,[2] namely, whether the insanity was the efficient cause of the crime; in six States the test is whether he had sufficient power to control his action, and knew that it was wrong. It is a little doubtful in which category Massachusetts should be placed, for Chief Justice Shaw's charge in *Commonwealth* v. *Rogers*[3] leaves one in some doubt as to whether he meant to recognize an irresistible impulse as a defence, or whether he only referred to a state of mind in which the accused was incapable of appreciating the nature and quality of his act. But, in any event, the great preponderance is in favor of the right and wrong test, as adopted by the English courts.

This view, that an insane person who knows that he is doing wrong is responsible, or the other view, that a person under an insane delusion is to be treated as if the facts that he imagines are real, has been violently attacked by Ray.[4] He objects that it limits too narrowly the scope of the operation of an insane affection, and that if a person who is insane does not reason logically, he does not have the consideration which is justly due him. If, for instance, a man under an insane delusion that others are continually plotting against him to ruin his reputation or fortune kills them, he is not excused; for even if they were so plotting, he would have no right to destroy them. But, it is argued, one whose mind is affected by insanity cannot and does not reason about such things, and cannot be held to a strict accountability for taking upon himself the avenging of his fancied injuries.

There seems to be much force in this reasoning. It is impossible to draw inferences of any kind that will be trustworthy in the case of an insane person. The forms and results of mental affection are so various and so little understood, that there is great danger of error in endeavoring to hold to any fixed rule in de-

[1] *United States* v. *McGlue*, 1 Curt. C. C. 1; *United States* v. *Holmes*, 1 Cliff. 98; *United States* v. *Shults*, 6 McL. 121.

[2] *Supra.*

[3] *Supra.*

[4] Ray's Med. Juris. of Insanity, Introduction.

termining the responsibility of its victims. Moreover, it must often be impossible for a jury to answer satisfactorily the questions as to the state of mind of a defendant, which are, as we have seen, generally left to it. But if the question were put in the more general form, which leaves to the jury the simple inquiry whether the accused was responsible for his acts, or (as it was put in *Hopps* v. *The People*[1]) whether the insanity was "the efficient cause of the act," it might be more easily and correctly answered. In the case of *State* v. *Jones*,[2] Mr. Justice Ladd reviews the whole question in an exhaustive and able opinion, and points out that the fixing of certain tests, as was done in *McNaughten's Case*, in reality trenches upon the province of the jury. The rule being established that an insane person is not responsible to the law for his acts, and evidence to support the plea of insanity having been put in, in any given case, the inquiry is limited to two questions: 1. Did the prisoner commit the act alleged? 2. Was he insane when he did the act? Now, these two questions are simple and direct, but the common practice has been to limit and confuse the second question by limiting the range of the inquiry. If a person does an act because he is insane, and if this is a defence, the jury, as sole judges of fact, ought to decide the matter untrammelled by arbitrary rules. What these rules practically amount to is a statement by judges, who are in no way competent as experts, as to what state of the mind shows insanity as to a given act; and this statement is binding on the jury even though the most competent experts should unanimously agree that the tests prescribed were wholly inadequate, or that no inflexible test could be applied. The weight of authority is certainly in favor of the rules given in *McNaughten's Case;* but is not the weight of principle and reason as strongly the other way?

II. — What is the Rule of Evidence as to the Proof of Insanity?

In considering the question of the rule of evidence in these cases, we come to a matter on which courts can speak with more certainty and authority, but on which they have no more agreed than they have on what constitutes insanity. Three views are found: 1st, Insanity must be proved by a preponderance of tes-

[1] *Supra.* [2] *Supra.*

timony ; 2d, Insanity must be proved beyond a reasonable doubt ; 3d. If the jury have a reasonable doubt of sanity, they must acquit. The correctness of each position is easily demonstrable if the premises are granted, and it is as to these premises that the holders of the first two views and of the last radically differ. The question does not appear to have been early debated, but in *Hadfield's Case* two expressions of opinion are found. Erskine, in opening for the prisoner, after setting forth the insanity which was his defence, said: "*The whole proof, therefore, is undoubtedly cast on* ME." But Lord Kenyon said, after hearing the evidence for the prisoner, "The facts . . . bring home conviction to one's mind that . . . he [the prisoner] was in a very deranged state. I do not know that one can run the case very nicely ; if you do run it very nicely, to be sure it is an acquittal. His sanity must be made out to the satisfaction of a moral man, . . . yet, if the scales hang anything like even, throwing in a certain proportion of mercy to the party." Here the counsel for the prisoner laid down a severer rule than that given by the court, certainly an unusual spectacle ; but it cannot be denied that Erskine's statement is law in England now and Lord Kenyon's is not. In *Regina* v. *Oxford*,[1] Lord Denman said that the insanity must be "shown," and (to cite no other cases) in the answers of the judges in *McNaughten's Case*[2] it is said that the insanity must be "clearly proved."

In America, though some doubt arises from the language of some decisions, New Jersey seems to stand alone in holding that insanity must be proved beyond a reasonable doubt.[3] Massachusetts,[4] Maine,[5] Virginia,[6] California,[7] Louisiana,[8] Minnesota,[9] Georgia,[10] Mississippi,[11] Alabama,[12] Ohio,[13] Missouri,[14] Pennsylvania,[15] Delaware,[16] and Texas [17] hold the burden to be upon the prisoner, some of them leaving the degree of proof required an open question. The United States courts, at least in the First

[1] 9 C. & P. 525.
[2] 10 C. & F. 200.
[3] *State* v. *Spencer*, 1 Zabr. 196.
[4] *Commonwealth* v. *Rogers*, 7 Met. 500.
[5] *State* v. *Lawrence*, 57 Me. 574.
[6] *Boswell's Case*, 20 Gratt. 860.
[7] *People* v. *Coffman*, 20 Cal. 230.
[8] *State* v. *Burns*, 25 La. Ann. 302.
[9] *State* v. *Gut*, 13 Minn. 341.
[10] *Choice* v. *State*, 31 Ga. 424.
[11] *Kelly and Little* v. *State*, 3 S. & M. 518.
[12] *State* v. *Brinyea*, 5 Ala. 241.
[13] *Loeffner* v. *State*, 10 Ohio St. 598.
[14] *State* v. *King*, 64 Mo. 591.
[15] *Sayres* v. *Commonwealth*, 88 Pa. St. 291.
[16] *State* v. *Pratt*, 1 Houst. Cr. 249.
[17] *Webb* v. *State*, 9 J. & J. 490; *King* v. *State*, id. 515.

Circuit,[1] hold that the burden is on the prisoner. But New Hampshire,[2] Nebraska,[3] Tennessee,[4] Illinois,[5] Indiana,[6] Kansas,[7] Kentucky,[8] Michigan,[9] New York,[10] and North Carolina[11] hold that where the jury has a reasonable doubt of the prisoner's sanity he must be acquitted. A slight preponderance of authority, therefore, favors the theory that a defendant alleging his insanity must prove it.

In considering which of the two theories is more correct in principle, it is desirable to consider the reasoning by which the advocates of either support their respective positions. In *State* v. *Spencer*,[12] Chief Justice Hornblower treats the two presumptions, of innocence and of sanity, as of equal weight. He says: "If it were doubtful whether the prisoner *committed the act*, then the jury ought to find in his favor; for where the jury find a reasonable ground for doubt whether the accused committed the homicide, they ought to acquit. *There* the presumption of law is in favor of the innocence of the party; every man is presumed to be innocent until he is proved guilty. But where it is admitted or clearly proved that he committed the act, but it is insisted that he was insane at the time, and the evidence leaves the question of insanity in *doubt*, there the jury ought to find against him. For there the other presumption arises, namely, that every man is presumed sane until the contrary is clearly proved. . . . *The proof of insanity at the time of committing the act ought to be as clear and satisfactory, in order to acquit him on the ground of insanity, as the proof of committing the act ought to be in order to find a sane man guilty.*" There certainly seems to be no reason why the strongest proof of the existence of so abnormal a state as insanity should not be required, and yet the force of presumptions is often arbitrarily settled, and not always in accordance with their natural weight. This presumption of sanity should, it would seem, be one of the strongest of all presumptions, and yet many courts have declared that it simply serves to make out a *prima facie* case for the prosecution, and vanishes at

[1] *United States* v. *McGlue*, 1 Curt. C. C. 1; *United States* v. *Holmes*, 1 Cliff. 98.

[2] *State* v. *Bartlett*, 43 N. H. 224; *State* v. *Jones*, 50 id. 369.

[3] *Wright* v. *People*, 4 Neb. 407.

[4] *Dove* v. *State*, 3 Heisk. 348.

[5] *Hopps* v. *People*, 31 Ill. 385; *Chase* v. *People*, 40 id. 352.

[6] *Stevens* v. *State*, 31 Ind. 485.

[7] *State* v. *Crawford*, 11 Kan. 42.

[8] *Smith* v. *Commonwealth*, 1 Duv. 224.

[9] *People* v. *Garbutt*, 17 Mich. 9.

[10] *People* v. *McCann*, 16 N. Y. 58.

[11] *State* v. *Cunningham*, 72 N. C. 469.

[12] *Supra*.

the production of so much opposing evidence as will raise a doubt of sanity. While this latter view is contrary to reason and the bulk of authority, the peculiar sanctity which Chief Justice Hornblower gave it appears to rest mainly on his *ipse dixit*, and there does not seem to be any universally accepted view on this point.

The view of those who maintain that the burden is upon the defence of proving insanity by a preponderance of evidence is that the plea is one in confession and avoidance, and that the new matter, insanity, which is pleaded in avoidance, must be proved by the pleader, but that there is no ground for placing upon him the same burden that is laid upon the prosecution by an arbitrary rule.

The view of those who hold that a reasonable doubt of insanity should acquit is well set forth in *McCann* v. *The People*:[1] "If there be a doubt about the act of killing, all will concede that the prisoner is entitled to the benefit of it; and if there be any doubt about the will, the faculty of the prisoner to discern between right and wrong, why should he be deprived of the benefit of it, when both the act and the will are necessary to make out the crime?"

It is difficult to see how this last view ever gained currency. Indeed, its supporters are somewhat troubled by the position of those who claim that the plea of insanity is one of confession and avoidance, and they have been driven to dispose of this objection by denying the fact on the ground that this plea denies malice, which is an essential of every crime, and is therefore a traverse. This position is, of course, utterly untenable, and has been ably exposed in *State* v. *Lawrence*.[2] To appreciate the fallacy, it is only necessary to consider the case of a plea of confession and avoidance in an action of tort. To a tort are necessary two things, *damnum* and *injuria*, corresponding precisely to the act and the malice in a crime. Now, a plea of confession and avoidance confesses the *damnum*, and, to be good, must confess facts from which, were there nothing more, the *injuria* would be presumed, but avoids the effect of this confession by showing other facts which must, to be a defence, show that there is no *injuria*. The effect of the plea *must* be to deny the *injuria*. In exactly the same way, one who pleads insanity to an indictment admits

[1] *Supra*.

[2] *Supra*.

facts from which malice is always, if there is nothing more, conclusively presumed, but avoids the presumption by the fact of insanity, and so denies the malice. It is clear, therefore, that the plea of insanity corresponds precisely to any other plea of confession and avoidance, and is not, simply because it denies malice, a traverse. The only other way in which this theory of the law can be defended is by saying that insanity is not new matter; that a sound mind is a necessary ingredient of crime, and is involved in the very idea of it; and that the presumption of sanity only goes so far as to render evidence needless if the issue be not raised. It would follow from this that if *any* defence which is not a denial of facts alleged in the indictment can be so far proved as to make the jury doubt whether it is not true, an acquittal must always follow; for if insanity is impliedly denied by the indictment, so are all the other matters that can be alleged to mitigate or excuse the offence. This is certainly not law in many places, and a little reflection will make one see the alarming consequences that would follow if it were.

It seems, then, that authority and principle concur in holding that a defendant alleging insanity must prove it, and that it is probably the law that a preponderance of evidence will suffice, though this latter question cannot be said to be fully settled.

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JURISDICTION IN GUITEAU'S CASE.

THE sixth amendment to the Constitution of the United States provides that an accused person shall be tried in the State and district wherein the crime shall have been committed, which district shall have previously been ascertained by law.

The question, then, in Guiteau's case is, where was the crime of murder committed? the fatal wound having been given in the District of Columbia, and the death therefrom having taken place in New Jersey.

At common law, murder, like other offences, must be inquired of in the county in which it was committed.

But it was a matter of doubt whether at common law, when a man died in one county of a wound received in another, the offence could be considered as having been completely committed in either county.

There are high authorities for saying that at common law a trial might always be had in the county where the mortal blow was given, for that alone is the act of the party, and the death is but the consequence, in support of which is cited 1 East, P. C., 361; 1 Hale, P. C., 426; 2 Whart. Crim. Law, § 1052, note *h;* yet Lord Hale afterwards says: "On the other hand, as to some respects, the law regards the death as the consummation of the crime, and not merely the stroke."

To remove this doubt the statute of 2 & 3 Edw. VI. ch. 24, § 2, enacted that when a man died in one county of a wound received in another, the trial should be in the county where the death happened.

The statute of Edward is not in force in this District.

By the act of Feb. 27, 1801, concerning the District of Columbia, it is provided that the laws of the State of Maryland as they now exist shall be and continue in force in the District.

The laws of Maryland thus enforced include not only those made, but those adopted by Maryland, and in force in that State at the time of the cession of the District.[1]

[1] 13 Pet. 17; 5 Pet. 233; 5 Otto, 309.

Was the statute of Edward adopted?

In the case of *Dashiell* v. *Attorney-General*,[1] it is said "that by the third section of the Bill of Rights the inhabitants of Maryland are entitled to the common law of England and the trial by jury, and to the benefit of such English statutes as existed at the time of their emigration, and which, by experience, have been found applicable to their local and other circumstances."

The court further say: "The third section of the Bill of Rights raises the question, which of the statutes existing at the time of the first emigration had by experience been found applicable? The only evidence to be found on that subject is furnished by Kitty's report of the statutes."

On the authority of this report it was held that the statute of 43 Eliz. was not in force in Maryland, this statute being classed among those then said not to have been found applicable.

In the recent case of *Ould* v. *Washington Hospital, &c.*,[2] under the rule laid down in Dashiell's case, the Supreme Court held that the statute of 43 Eliz. ch. 4, then under consideration, was not operative in the District of Columbia.

An examination of Kitty's Report will show that among the statutes found applicable and proper to be incorporated, the statute 2 & 3 Edw. VI. ch. 12 [ch. 24? — Editor], does not appear.

But if it was ever applicable to Maryland, it was repealed by ch. 22, § 2, of an act of Maryland passed in 1789, which provides that if a mortal stroke be given on one shore of this State, and death happens on the other shore, the party giving the stroke may be tried in the county where the stroke was given, or where the death happened.

This statute of Edward was afterward repealed by the twelfth section of Geo. IV., ch. 64, which provided that when any felony shall be begun in one county, and completed in another, it may be inquired of, tried, and punished in either of the counties.

This is the law of England at this time. In several of the States of the United States similar statutes have been enacted.

In Massachusetts, for example, it is enacted that if a mortal wound is given on the high seas or on land, either within or without the limits of that State, by reason whereof death ensues in any county thereof, the offence may be prosecuted in the county where the death happened.[3]

[1] 5 H. & J. 392. [2] 5 Otto, 309. [3] Gen. Stat. 171, § 19.

In the case of *Commonwealth* v. *Macloon* and others, it was held under the statute that a citizen of another State could be convicted of the manslaughter of a person who died, within the Commonwealth, of injuries inflicted on the high seas.[1]

In Michigan, under a similar statute, a case arose where the fatal wound was given on a navigable fresh-water river within the boundaries of Canada, but the death occurred in Michigan. The defendant being indicted for murder in Michigan, the court held that the crime, though commenced in Canada, was consummated in that State; that the wound did not constitute the offence of which the prisoner was convicted; that the consequences of the wound were not confined to Canada, but continued to operate until the crime was consummated by death. If such killing did not at common law constitute murder, it was the clear intent of the statute to make it such to the same extent as if the wounding and death had both occurred in the State.[2] There was a strong dissenting opinion in the case, taking the ground that the murder was committed where the blow was given, and that the State had no jurisdiction of the case.

In New Jersey a statute is in force modelled after the English statute of George IV. before cited.

In the case of *Hunter* v. *The State*, recently tried and determined under this statute, it was held that when a mortal blow was given within the jurisdiction of the State, and the death occurred in another State, the court of New Jersey have cognizance of the crime by force of the statute.[3]

In Mississippi the indictment must, by the statute, be found in the county where the death occurred, and the indictment must so state.[4]

In Missouri it was held that when the mortal wound was given in one county, and death occurred in another, the indictment may be found in either county.[5]

The case of *Riley* v. *The State*, arising in Tennessee in 1849, was tried under a statute which provided that in all criminal cases the trial shall be held in the county in which the offence may have been committed. It appeared that the blow was given in one county, and the death occurred in another. The statute

[1] 101 Mass. 1.
[2] *Tyler* v. *State of Michigan*, 333.
[3] 40 N. J. 548.
[4] *Turner* v. *State*, 28 Miss. 684.
[5] *Steerman* v. *State*, 10 Mo. 503.

using the word "offence," the question what constituted the offence was discussed.

Under the statute referred to, the court held that the offence was committed where the blow was given.

In Iowa a statute provides that when a criminal act has been committed in one county and consummated in another, the offender may be indicted in either county. In *Nash* v. *The State*,[1] it was held that when a mortal blow was inflicted in Scott County, from which the death took place in Muscatine County, the latter county had jurisdiction.

Coming now to legislation on this question by the United States, it appears that by the third section of the act of April 30, 1790, Congress provided that every person who commits murder within any fort, arsenal, dockyard, magazine, or in any place or district of country under the exclusive jurisdiction of the United States, shall, on conviction, suffer death, and by the eighth section, if any person shall commit on the high seas, or in any river, harbor, basin, or bay, out of the jurisdiction of any particular State, murder, such offender shall suffer death, and the trial shall be in the district where the offender is apprehended or where he may be brought.

Under the eighth section of this statute it was held in *McGill's Case* that both the mortal stroke must be given and the death happen on the high seas to give the courts of the United States jurisdiction, and that when the wound was given in the harbor of St. Francois, but the death did not happen until the deceased was removed to the land, the offence was not cognizable under the statute.[2]

The same rule was laid down in the case of *United States* v. *Armstrong*.[3]

This defect in the statute was afterward remedied as to murder by the fourth section of the act of March 3, 1825, which provided that if any person shall give a wound on the high seas, and the person wounded shall afterwards die of such wound on the land, within or without the jurisdiction of the United States, the United States courts shall have jurisdiction of the offence, and afterwards as to manslaughter, by the act of 1857, ch. 116, sec. 1. The statutes, however, it will be observed, relate only to wounds given on the waters described in the acts.

[1] 2 Iowa. [2] *United States* v. *McGill*, 4 Dallas, 42. [3] 2 Curtis, C. C. 446.

The question where a wound is given on land in one district and the death occurs in another is not touched.

But in 1809, there then being no statute law in this regard, a case arose in which it was held by the District Court of this District that if the mortal stroke was given in Alexandria, then a part of the District of Columbia, and the death happened in Maryland, the court of the District has not jurisdiction of the offence.

It was a *per curiam* decision, the court simply saying its opinion was that, as the death happened in St. Mary's County, Md., although the fatal stroke was given in the District, the judgment must be for the prisoner, relying on *Heydon's Case;*[1] *Horne* v. *Ogle.*[2]

This is the only decision on this point made by a court of the United States. Not being overruled, it is authority in the present case. It may not be conclusive, however, for by the thirtieth section of the act of March 2, 1867, Congress has provided that, *When any offence shall be begun in one judicial district and completed in another, every such offence shall be deemed to have been committed in either, and may be dealt with, tried, determined, and punished in either, in the same manner as if it had been actually and wholly committed therein.*

There is no doubt but that the District of Columbia and New Jersey constitute judicial districts ascertained by law as provided in the Constitution of the United States.

The present case was, therefore, clearly provided for under this act. But the law was not codified in sec. 731, Revised Statutes, as it originally passed.

The codifiers, for some reason which does not appear, changed somewhat the phraseology of the act referred to. They use the words "judicial circuit" instead of "judicial district;" so that the section, as codified, reads: "When any offence is begun in one judicial *circuit* and completed in another, it shall be deemed to have been committed in either, and be tried, determined, and punished in *either district.*"

This change throws doubt upon the point whether the Supreme Court of this District, under this section, would have jurisdiction of the offence in question, because the District of Columbia may not be held to be a judicial circuit. But this

[1] 4 Coke, 41.

[2] 4 Coke, 42; 2 Inst. 318; 3 Inst. 48, 49, 73.

doubt may be somewhat lessened when it is observed that sec. 731, Revised Statutes, provides that such offence may be "dealt with, inquired of, tried, determined, and punished in *either district.*" To make the section consistent it would seem that the words *circuit* and *district* should be construed as meaning the same thing. Should there be doubt as to the correct interpretation, the court would refer to the original act. 15 Court of Claims, 87.

By sec. 530, Rev. Stats., *et seq.*, the United States are divided into judicial districts, some of the districts being composed of entire States, and others of part of a State. By sec. 604 the judicial districts are grouped as judicial circuits.

The District of Columbia is not mentioned in these sections as a district, or as composing one of the circuits.

The act of Feb. 27, 1801, concerning the District of Columbia, however, provided that there shall be a court in said district to be called a Circuit Court of the District of Columbia, having all the power vested in the Circuit Courts of the United States. This was the name of the court till 1863, when the act of March 3, 1863, reorganizing the court in the District of Columbia, enacted that there shall be a Supreme Court in the District, possessing the same power and exercising the same jurisdiction now possessed and exercised by the Circuit Court. This act is codified in section 750 and sections following of the Revised Statutes relating to the District of Columbia.

The Supreme Court of this district, therefore, under this statute, has all the power of a Circuit Court, among which is jurisdiction of all crimes and offences cognizable under the authority of the United States, except where it may be otherwise provided by law. See also sec. 93 of the Revised Statutes of the District of Columbia, making the laws of the United States applicable to this District.

It would seem, therefore, under the statute quoted, though there is no judicial decision on the subject, that while some doubt, as before stated, is thrown on the question by the language of sec. 731, yet that it would not be a violent construction to hold that the District may be considered a judicial circuit for the purpose of the act, and that therefore the defendant may be held and punished in the District of Columbia. But if the statute fails to give the court jurisdiction, it will be seen that the law is

by no means settled as to what constitutes murder. While the court in Bladen's case, before cited, held that, to constitute murder in Alexandria, both the stroke and death should occur there, the case from the report does not seem to have been argued by either side. The case may not, therefore, have received the consideration which the importance of the present one demands.

It is true the opinion of the court was sufficient for that particular case, yet, in view of the grave doubts expressed by the common-law writers, it should not be regarded as conclusive on the question as to what constitutes the crime of murder. The opinion that the fatal blow constituted the crime seems quite as authoritative as the contrary one.

And as said by the Supreme Court in Tennessee, in Riley's case, the view is more in accordance with common opinion.

In confirmation also of this may be cited a case decided in England in 1831, in which it was held that giving the blow which caused the death constituted the felony, and that the languishing is not any part of the offence; that, therefore, an indictment which charged that the prisoner gave the deceased a mortal blow in the County of Middlesex, and that he languished and died in the County of Kent, was good. (*Rex* v. *Hargrave*, 1 C. & P. 170.)

Cole's case, Plowden, 401, is also to the same point. Cole was indicted for the murder of Elizabeth Pembroke, who was wounded on the 12th of February and died on the 18th of June following. Cole pleaded an intermediate pardon of all felonies. It was argued on the part of the Crown that his act did not become a felony until the death, and therefore was not one of the felonies pardoned. But the justices agreed "that the pardon discharged the prisoner, because the wound given by him was the cause of the felony, the giving of which wound was an offence and misdemeanor against the Queen, and that being pardoned, all the consequences that followed from said offence were also pardoned thereby."

By J. H. Robinson.

Washington, D. C.

ANOTHER VIEW OF THE JURISDICTION IN GUITEAU'S CASE.

It seems to be well settled that offences against the municipal laws of the District of Columbia are offences against the United States, and are so treated in indictments,[1] because, by the Constitution of the United States, Congress "has exclusive jurisdiction in all cases whatsoever over such District — not exceeding ten miles square — as may by cessions of particular States become the seat of government of the United States, like authority over such place as may be purchased for forts, dockyards, &c."[2] Murder committed in forts, &c., or any other place or district of country under the exclusive jurisdiction of the United States, is punished by death.

By a nicety of the common law, as a grand jury could not inquire of a fact done out of the county for which they were sworn, where a man was wounded in one county and died in another, the offender was, at common law, indictable in neither, because no complete act of felony was done in either; but by a statute of Edward VI. he was indictable in the county where the party died.[3] This statute was no doubt the common law of the colonies which became the States of the Union.[4] But, in the opinion of most American jurists, the crime of murder is not punishable at common law unless the victim dies within a year and a day, and within the State of the Union where the fatal blow was inflicted or poison administered. This has been held to be the law of the District of Columbia in *United States* v. *Bladen*.[5] The defendant Bladen was acquitted because his victim went into St. Mary's county in Maryland to die; and such is implied to be the law in Massachusetts in *Commonwealth* v. *Macloon*.[6]

In Massachusetts, although we have a statute providing for the punishment of a murderous assault committed in another country,

[1] *Cohens* v. *Virginia*, 6 Wheat. 84; *United States* v. *Williams*, 4 Cranch, C. C. 377.

[2] Const. art. 8, ¶ 18, by § 5339, Revised Statutes of United States.

[3] 4 Bl. Com. 303.

[4] *Commonwealth* v. *Knowlton*, 2 Mass. 534.

[5] 1 Cranch, C. C. 548.

[6] 101 Mass. 1.

from the effect of which the victim dies in Massachusetts, yet a murderous assault committed in this State, followed by death in another jurisdiction, cannot be punished as murder; whereas, by the statute of New Jersey, a murderous assault committed without the State, followed by the death of the victim within the State, or a blow inflicted within the State, followed by death elsewhere, may be punished as murder. Similar statutes have been passed in fourteen or fifteen of the States of the Union, by which the defect in the law has been recognized and remedied. But there are no like statutes of the United States for the District of Columbia. But in 1867 a revenue act was passed, and a section thereof punishing conspiracies to defraud the revenue provided that "where any offence shall be begun in one judicial district of the United States and completed in another, every such offence shall be deemed to have been committed in either," and may be punished accordingly.

This statute, severed into portions, was incorporated into the Revised Statutes of the United States, and therefore repealed; the revenue clauses were placed in one part of the Revised Statutes, and the clause concerning "offences begun in one district and completed in another" was made a new section, viz., § 731. Revised Statutes, § 5600, provides that "the arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same," and therefore no inference or presumption of legislative construction is to be drawn by reason of the title under which any particular section is placed.

By § 731, Revised Statutes of the United States, in Title XIII., treating of the judiciary then, it was provided: "Where any offence against the United States is begun in one judicial district ['*circuit*,' in second edition] and completed in another, it shall be deemed to have been committed in either, and may be dealt with, &c., and punished in either district in the same manner as if it had been actually and wholly committed therein." It is under this provision that the government officers, in prosecuting Guiteau, hope to secure his conviction in the District of Columbia.

It is obvious that there are very serious difficulties about this which should not be overlooked. It will doubtless be claimed that the continuing offences begun in one district and completed

in another are offences against the revenue only; but supposing that the clause as to punishing continuing crimes is intended to be general, and to apply, as its words may, to all offences against the United States, the more serious difficulty is, that the clause only applies to crimes which would be offences against the United States, both in the district or circuit in which they are begun, and in which they are completed. For instance, if the victim stricken in the District of Columbia had died in Canada, the case would come within the Bladen case, and would not be covered by the provisions of Revised Statutes, § 731, any more than would the case of one stricken in Canada and dying in the District of Columbia. Again, if one wounded in New Jersey died of the wound in the District of Columbia, the person inflicting the wound would not be within the statute,[1] because the wounding in New Jersey was not an offence against the laws of the United States, but against the State of New Jersey, and therefore, would not be "begun in one district (or circuit) and completed in another." Therefore it seems probable that the crimes referred to in the Revised Statutes, § 731, are only those which would be offences against the United States in both the district of inception and the district of completion. As, for instance, a fatal blow in the District of Columbia, followed by death in a Territory of the United States, would be precisely within the statute. The question is, not whether Congress might not pass an act punishing an assault committed in the District of Columbia, resulting in death elsewhere, but whether it has done so.

Again, the Revised Statutes of the United States, § 5339, which punishes murder, but leaves murder to be defined by common law, provides that "every person who commits murder": First — "in any fort, arsenal, &c., or district of country under the exclusive jurisdiction of the United States;" second — "or upon the high seas, or in any river, harbor, &c., within the admiralty and maritime jurisdiction of any particular State;" third — "or who, upon any of such waters," inflicts an injury of which the injured person dies within or without the United States, "shall suffer death." This third clause was taken from the act of March 3, 1825, and that act was passed because the courts had held that "a killing with malice from a stroke on the sea, which produced death on

[1] Rev. St. § 731.

shore, was not murder on the high seas," under the second clause;[1] and the fact that the courts had so held gives force to the position taken in this article, that, to constitute murder, death must take place within the jurisdiction where the blow was inflicted.

In this very unsatisfactory state of the law it would seem to be much more prudent for those entrusted with the duty of bringing the assassin to justice to have his trial take place in the courts of New Jersey, in which the statute before cited has been pronounced constitutional, and under which there has been a conviction in a recent case.[2]

ROBERT D. SMITH.

BOSTON, MASS.

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[1] *United States* v. *Magill*, 1 Wash. C. C. 463; *United States* v. *Armstrong*, 2 Curtis, 495.

[2] *Hunter* v. *The State* (1878), 40 N. J. C. C. 451.

DISQUALIFICATION OF JURORS ARISING FROM BIAS, PREJUDICE, OR OPINION.

§ 1. Introductory. — It is conceived that at no time in many years past has this single topic been brought so pointedly to

the attention of the bar and the people of this country as at the present. A crime has been committed which has thrilled the civilized world with horror. The perpetrator of this act of unprecedented wickedness is within the grasp of the law. No English-speaking man outside of a mad-house can be ignorant that the late Chief Magistrate of the United States fell by the hand of one Guiteau. It is a fact of which every intelligent man is as thoroughly convinced as he can be of anything established by proof short of ocular demonstration. What course shall be pursued in impanelling a jury to try the criminal? What bias or prejudice in this case will render incompetent a juror otherwise qualified to try the defendant? What opinions formed or expressed will have this effect? These are questions which startle the citizen and perplex the practitioner. The occasion, therefore, seems peculiarly appropriate to a discussion of the whole subject of disqualification of jurors in all cases, civil as well as criminal, arising from bias, prejudice, and opinions upon the subject-matter to be tried. The following sections, therefore, will not discuss Guiteau's case in detail. A candid statement and illustration of the principles of the law upon the general subject will be the aim. A concluding section will contain brief observations upon Guiteau's case particularly.

§ 2. Conscientious Scruples or Opinions against Capital Punishment. — These do not seem to have been as tenderly regarded formerly as in later times. Thus, in a report of *nisi prius* cases in Pennsylvania[1] we find that in one case a juror, on being called up and requested to go into the jury-box, declared that he was conscientiously scrupulous about sitting on a case of life and death, and could never, upon any evidence which might be given, join in a verdict the consequence of which might be to inflict the punishment of death. The prosecuting attorney, however, did not challenge him. "He stood then," said the court, "in the situation of a juror having no legal cause to assign, refusing to be qualified or to perform his duty. Nothing, of course, remained but for this court (who are imperiously bound to obey the law) to imprison him for contumacy."[2]

[1] *Com.* v. *Gross*, 1 Ashmead, 281, 287.

[2] Ib. p. 287. In *United States* v. *McMahon*, 4 Cranch C. C. 573, the question was submitted to triors, whether a person having the conscientious scruples above stated was a competent juror in a capital case. Later, such scruples were held to be good ground for a challenge for

This matter was first decided in favor of the challenge by Mr. Justice Story in the year 1820.[1] Two Quakers, upon being called to be sworn in a capital case, excepted to themselves as disqualified. They believed that men might be rightfully punished with death for the causes set down in the divine law, but for none others; and in point of conscience they could not give a verdict for a conviction where the punishment was death, unless the case was directly within the terms of the divine law. Upon these facts the enlightened jurist said: "It is well known to us all that our laws annex the punishment of death in several cases where the divine law is silent, and under circumstances different from those expressed in the law. To compel a Quaker to sit as a juror on such cases is to compel him to decide against his conscience, or to commit a solemn perjury. Each of these alternatives is equally repugnant to the principles of justice and common sense. To insist on a juror sitting in a cause when he acknowledges himself to be under influences, no matter whether they arise from interest, from prejudices, or from religious opinions, which will prevent him from giving a true verdict according to law and evidence, would be to subvert the objects of a trial by jury, and to bring into disgrace and contempt the proceedings of courts of justice."[2] This was followed by the decision of the Supreme Court of Pennsylvania to the same effect,[3] since which time this challenge has been generally allowed.[4]

cause. *United States* v. *Ware*, 2 Cranch C. C. 477. In *Mansell* v. *Reg.*, 8 El. & Bl. 54, the point was raised, but it became unnecessary to decide it.

[1] *United States* v. *Cornell*, 2 Mason, 91, 104.

[2] Ib. p. 105. In *People* v. *Ryan* (tried in 1823), 2 Wheeler Cr. C. 47, a Quaker was excused from service as a juror in a capital case because the tenets of his religion would not justify him in taking the life of any human being for any crime. On the same trial another juror who was not a Quaker was compelled to serve, although he alleged conscientious scruples against finding a verdict that would put in jeopardy the life of the prisoner. Later, however, such a juror was excused. *People* v. *Jones*, Edm. Sel. Cas. 112.

[3] *Com.* v. *Lesher*, 17 Serg. & R. 155.

[4] See *O'Brien* v. *The People*, 36 N. Y. 276; s. c. 48 Barb. 274; *Lowenburg* v. *The People*, 5 Park. C. R. 414, 425; *United States* v. *Wilson*, Baldwin, 83; *Clore's Case*, 8 Gratt. 606; *Lewis* v. *State*, 9 Smed. & M. 115; *Williams* v. *State*, 32 Miss. 389; *State* v. *Kennedy*, 8 Rob. (La.) 590; *Com.* v. *Twombly*, 10 Pick. 480, note; *Burrell* v. *State*, 18 Tex. 713; *Hyde* v. *State*, 16 Tex. 445; *White* v. *State*, 16 Tex. 207; *Montague* v. *Com.*, 10 Gratt. 767; *People* v. *Sanchez*, 24 Cal. 17; *Waller* v. *State*, 40 Ala. 325; *People* v. *Tanner*, 2 Cal. 257; *Pierce* v. *State*, 13 N. H. 536, 556; *State* v. *Ward*, 39 Vt. 225; *White* v. *State*, 16 Tex. 206; *Ethridge* v. *State*, 8 Tex. App. 133; *Com.* v. *Sherry*, Whart. Hom. 481; *Martin* v. *State*, 16 Ohio, 364; *Haywood* v. *Calhoun*, 2 Ohio St. 164; *St. Louis* v. *State*, 8 Neb. 405; *Williams* v. *State*, 3 Ga. 453; *Russell* v. *State*, 53 Miss. 367; *White* v. *State*, 52 Miss. 216; *Fortenberry* v. *State*,

Some courts have held that a juror, although conscientiously opposed to capital punishment, ought to be permitted to serve upon the trial of a capital offence when confident of his ability to do justice between the State and the accused, notwithstanding his scruples.[1] The wisdom of this conclusion may be strongly questioned. One conscientiously scrupulous of taking human life by process of law ought not, although willing, to be placed in such a position that to observe his oath as a juror he may be called upon to violate his conscience, or *vice versa*, to follow the dictates of his conscience he may violate his oath. A juror ought not to be permitted to serve, having, in one breath, affirmed and disaffirmed his competency.[2]

Doubtless such a juror would require more evidence to induce him to render a verdict of guilty in a case where the punishment is death, than where it is imprisonment merely. This circumstance alone ought to disqualify him.[3] And so, where the juror declares that his conscientious scruples are limited to cases in which circumstantial evidence is relied upon for a conviction.[4] This kind of evidence the law recognizes as of the highest value, and a juror

55 Miss. 403; *Jones* v. *State*, 2 Blackf. 475; *Gross* v. *State*, 2 Ind. 329; *Driskill* v. *State*, 7 Ind. 338; *Fahnestock* v. *State*, 23 Ind. 231; *Grecnley* v. *State*, 60 Ind. 141; *Monday* v. *State*, 32 Ga. 672; *State* v. *West*, 69 Mo. 401; *People* v. *Wilson*, 3 Park. Cr. R. 199; *State* v. *Mullen*, 14 La. An. 570; *State* v. *Reeves*, 11 La. An. 685; *State* v. *Clark*, 32 La. An. 559. This question was set at rest in New York as early as 1801 by a statute which declared that "no Quaker or reputed Quaker shall be compelled to serve as a juror upon the trial of any indictment for treason or murder." At the time this statute was passed it was supposed that the Society of Friends alone were opposed to capital punishment. It subsequently appearing that persons other than of this sect denied the propriety of such punishment, it was enacted that "persons of any religious denomination whose opinions are such as to preclude them from finding any defendant guilty of an offence punishable with death, shall not be compelled or allowed to serve as jurors on the trial of an indictment for an offence punishable with death." 2 Rev. Stat. 734, § 12. In a case arising under this statute it was contended that this section embraced those only who belonged to a religious denomination which as a body entertained such opinions. But Chief Justice Savage rejected this construction, and held any person entertaining such opinions to be unfit to be a juror under the circumstances. *People* v. *Damon*, 13 Wend. 351, 354. The grounds of the conscientious scruples of a particular juror are of no importance. It is sufficient to exclude him from the panel that they exist. *Walter* v. *People*, 32 N. Y. 147, 161; *O'Brien* v. *People*, 36 N. Y. 276, 278; *Gordon* v. *People*, 33 N. Y. 501.

[1] *Williams* v. *State*, 32 Miss. 389; *People* v. *Wilson*, 3 Park. C. R. 199.

[2] *Waller* v. *State*, 40 Ala. 325. A juror who stated upon the *voir dire* that he did not think he could do the prisoner justice, was held incompetent, although he subsequently stated that he could come to the trial with an unbiassed and unprejudicial mind. *Wright* v. *Com.*, 32 Gratt. 941.

[3] *State* v. *Ward*, 39 Vt. 225.

[4] *Shafer* v. *State*, 7 Tex. App. 239; *Jones* v. *State*, 57 Miss. 685.

in any case who cannot give it due weight ought to be excluded.[1]

The rule of exclusion holds good, although the offence may be punished capitally or otherwise, in the discretion of the jury. Thus, on the trial of an indictment for grand larceny, punishable with imprisonment or death, one called as a juror, who stated that he would hang a man for murder, but would not hang him for stealing, was held to have been properly rejected. "He was not," said Murray, C. J., "in a position to exercise that discretion upon a full hearing of the case which the law contemplated he should possess."[2]

§ 3. Opposition to Capital Punishment upon Political Grounds. — One opposed to capital punishment "on principle" is not incompetent to sit upon the trial of a case involving the death penalty. As observed by the Supreme Court of California on one occasion, "Many men are opposed on principle to capital punishment, because, as often remarked, they believe that the worst use that can be made of a man is to hang him. They believe that society would be benefited by the adoption of some other mode of punishment, and yet, as long as the law provides that certain crimes shall be punished with death, would feel no conscientious scruples in finding a verdict of guilty against one accused of such crime. With them it is a principle founded on political prejudices, or public policy, with which conscience has no connection whatever."[3]

§ 4. Opinion upon the Subject-matter in a Civil or Criminal Case. — The reports furnish a large body of authority upon this topic. It has acquired especial prominence in criminal cases where the conscientious efforts of courts to do full justice to accused persons, especially in capital cases, have resulted in many metaphysical and impracticable distinctions which have produced great confusion and injustice in the admin-

[1] *Smith* v. *State*, 55 Ala. 1; *People* v. *Ah Chung*, 54 Cal. 398; *State* v. *West*, 69 Mo. 401; *Gates* v. *People*, 14 Ill. 433; *Jones* v. *State*, 57 Miss. 685; *State* v. *Bunger*, 11 La. An. 607.

[2] *People* v. *Tanner*, 2 Cal. 257. See also *Caldwell* v. *State*, 41 Tex. 87; *State* v. *Melvin*, 11 La. An. 535; *Driskill* v. *State*, 7 Ind. 338; *Greenly* v. *State*, 60 Ind. 141.

[3] *People* v. *Stewart*, 7 Cal. 140, 143, per Murray, C. J. See also *Com.* v. *Webster*, 5 Cush. 295, 298; *Atkins* v. *State*, 16 Ark. 568. It is no evidence of the existence of the conscientious scruples in question that a juror, when interrogated upon the subject, simply says that he "would not like for a man to be hung." *Smith* v. *State*, 55 Miss. 410.

istration of the law. This is obvious from the experience of practitioners and frequent observation from the bench, that upon no question of civil or criminal practice have the decisions of the courts been more inharmonious than upon this question of qualification or disqualification of jurors, arising from the formation or expression of opinion of the guilt or innocence of the accused.[1]

In a late decision of the Texas Court of Appeal, Clark, J., delivering the opinion of the court, took a despondent view of the situation. "It would be a useless and almost interminable task," said he, "to explore the various decisions of the several States for the purpose of reconsidering them, and deducing therefrom a uniform rule as to the competency of a juror in a criminal case. The decisions of scarcely any one State are reconcilable with each other, and the mind would be lost in bewilderment at the threshold of the attempt. Evidently in the adjudication of particular cases the courts have not been guided by any fixed principle, and as a consequence, our jurisprudence in this respect has long since been launched upon a sea of chaos." [2]

We cannot, therefore, endeavor to explore all the exquisite distinctions which the books afford, but in the following sections an effort will be made to set forth the cardinal rules, and to discuss the tendency of recent decisions upon this subject.

§ 5. (Continued.) Generally a Challenge for Principal Cause. — Where the distinction is retained between challenges for principal cause and to the favor, the formation or expression of an opinion tending to disqualify a juror is generally regarded as a principal cause of challenge, and therefore to be tried by the court.[3] But the impressions or opinions entertained by the juror may not be sufficient in law to affect his competency; wherefore, a challenge to the favor may be taken, in which case the triors may properly find the juror to be incompetent.[4] And where a challenge to the favor is taken in the first instance, although the facts proved before the triors would support a chal-

[1] *People* v. *Reynolds*, 16 Cal. 128.

[2] *Rothschild* v. *State*, 7 Tex. App. 519, 542.

[3] *Pringle* v. *Huse*, 1 Cow. 432; *Ex parte Vermilyea*, 6 Cow. 555; *People* v. *Vermilyea*, 7 Cow. 108; *People* v. *Allen*, 43 N. Y. 28; *Rice* v. *The State*, 1 Yerg. 432; *McGowan* v. *The State*, 9 Yerg. 184; *Com.* v. *Lesher*, 17 Serg. & R. 156.

[4] *Freeman* v. *People*, 4 Den. 9, 35; *People* v. *Honeyman*, 3 Den. 121; *Smith* v. *Floyd*, 18 Barb. 522; *Barker* v. *McMahon*, 2 Park. C. R. 663; *Anderson* v. *State*, 14 Ga. 709; *Ray* v. *State*, 15 Ga. 223; *Stout* v. *People*, 4 Park. C. R. 132; *Schoeffler* v. *State*, 3 Wis. 823.

lenge for principal cause, yet the question of competency belonging exclusively to the triors, the court cannot be called upon to rule, as matter of law, that the juror, upon the facts proved, is incompetent. The prisoner, by taking a challenge in this form, remits the decision of the question to the discretion of the triors. The triors may, therefore, properly find the juror to be competent.[1]

§ 6. Formation without Expression of Opinion. — The simple formation of an opinion without any expression of it does not seem to have been considered a cause of challenge at common law. Indeed, at common law it was only the expression of such opinions or beliefs as showed *ill-will* which disqualified the juror.[2] However, a careful study of the cases relating to the competency of jurors shows a tendency in modern times to multiply the causes of disqualification. Accordingly, we find in the early trial of Fries for treason against the United States that Mr. Justice Chase allowed this form of question to be put to the jurors: "Have you ever formed *or* delivered an opinion as to the guilt or innocence of the prisoner, or that he ought to be punished?"[3] But during the same year, in another famous trial before the same judge, the form of the question was: "Have you ever formed *and* delivered an opinion upon the charges contained in the indictment?"[4]

These cases show that it was quite uncertain whether a bare formation of an opinion as to the guilt of an accused person would *per se* disqualify the juror to sit upon his trial. Upon the presentation of the articles impeaching Mr. Justice Chase, in the year 1805, his conduct during the several trials of Fries and Callender, before noticed, as showing oppression in office, and an overweening desire to convict, were the substantial charges. The question allowed in *Callender's Case* became the target of especial invective from the counsel for the prosecution as being in the conjunctive instead of disjunctive form. "Being put in the conjunctive," said Mr. Randolph, "the most inveterate foe of the traverser who was artful, or cautious enough to forbear the expression of his enmity, would therefore have been admitted

[1] *People* v. *Allen*, 43 N. Y. 28.

[2] 2 Hawk. P. C. ch. 43, § 28; *Rex* v. *Edmonds*, 4 Barn. & Ald. 471, 492.

[3] Whart. St. Tr. 610, 614.

[4] *Callender's Case*, Whart. St. Tr. 688, 696.

as competent to pass between the traverser and his country in a criminal prosecution." [1]

Two years later, when it became the duty of Chief Justice Marshall, upon a charge of treason against the United States, to sit at the trial of the presiding officer of the body before whom Mr. Justice Chase was arraigned, the form of question adopted by the latter upon the trial of Callender was approved, not only once, but many times during the examination of the jurors.[2] The Chief Justice pointedly said: "The rule is, that a man must not only have formed, but declared, an opinion in order to exclude him from serving on the jury." [3]

Upon this point the Tennessee court, in an early case, observed that the juror might be asked "whether he has given an opinion beforehand, but not whether he has formed an opinion, for such is the nature of the human mind that it cannot remain in perfect suspense. The best men, hearing of any transaction in society, will unavoidably receive some impression, but still may stand indifferent between the parties as respects the investigation and determination of the cause. But when the relation of a transaction so interests the mind as to enable it to retain a recollection of its circumstances, so as to give an opinion, we cannot well presume a perfect indifference. Giving an opinion is a proof of a strong impression having been made, which is certainly improper in a juryman." [4] And this is the view of other courts.[5]

The better view, however, would seem to be that the mere *expression* of an opinion is not an essential condition of disqualification. The expression of the opinion is only an evidence of its existence. If the juror upon his *voir dire* manifests or admits the existence of an opinion amounting to a prejudgment of the case, he is disqualified whether he has ever expressed the opinion or not.[6] And the statutes of the several States at the present

[1] Chase's Trial, p. 117.

[2] Trial of Aaron Burr, pp. 43, 44, 370, 371, 415, 416, 417, 419, 425.

[3] Ibid. p. 44.

[4] *Berry* v. *Wallen*, 1 Overton (Tenn.), 187; *Temple* v. *Sumner*, Smith (N. H.), 226, 231.

[5] *State* v. *Godfrey*, Brayt. (Vt.) 170; *United States* v. *Watkins*, 3 Cranch, 565; *United States* v. *Devaughan*, 3 Cranch Cr. C. 84; *State* v. *Madoil*, 12 Fla. 191; *Boardman* v. *Wood*, 3 Vt. 570; *State* v. *Clark*, 12 Vt. 619; *State* v. *Phair*, 48 Vt. 366; *State* v. *Tatro*, 50 Vt. 483; *Noble* v. *People*, Breese, 29; *Hudgins* v. *State*, 2 Ga. 173; *Boon* v. *State*, 1 Ga. 619; *Reynolds* v. *State*, 1 Ga. 228; *Baker* v. *State*, 15 Ga. 498; *Griffin* v. *State*, 15 Ga. 476.

[6] *Osiander* v. *Com.*, 3 Leigh, 780; *Armistead's Case*, 11 Leigh, 657; *State* v. *Wilson*, 38 Conn. 126; *United States* v. *Hanway* (*Walsh's Case*), 2 Wall. Jr. 139; *United States* v. *Wilson*, Bald. 84; *People* v. *Christie*, 2 Park. Cr. R. 579; s. c. 2 Abb.

time quite uniformly declare that the formation as well as the expression of an opinion upon the case to be tried shall constitute a cause of challenge.

§ 7. PREJUDICE AND BIAS DISTINGUISHED. — A prejudice has been said to be in some sense an opinion.[1] It is a prejudgment of the case, and as such, in the eye of the law, has no degrees.[2] Perhaps it would be more accurate to say (what further appears in the cases cited) that "prejudice" and "prejudgment" signify a "fixed," "settled," or "absolute" opinion, as distinguished from an opinion casually formed.[3] Thus, the language of the court in an early case is as follows: "*Prejudging* and giving *an opinion* on the statement of certain facts are very different things. The first implies a strong disposition to favor the one side or the other, — a determination to find in one way, let the evidence be what it will. The last involves the truth of certain facts and propositions in the sentiments delivered; and impressions thus made may be effaced by the production of other evidence."[4]

The popular meaning of the term "prejudice" is probably something more than simple prejudgment. It is frequently considered as involving some grudge or ill-will, as well as a preconceived opinion. And this is probably the meaning which most jurors attach to the term. Hence it is, that although they may have formed decided opinions, yet entertaining no grudge towards a prisoner, and feeling no ill-will towards him, they answer that there is no prejudice resting on their minds.[5]

Bias, on the other hand, has been defined to be "a particular influential power, which sways the judgment; the inclination of the mind towards a particular object."[6] This term, where it occurs in statutes, suggests another and somewhat different ground of disqualification than is indicated by the term "prejudice." A man cannot be prejudiced against another without being biassed against him; but he may be biassed without being prejudiced.[7]

Pr. 256; *Com.* v. *Knapp*, 9 Pick. 496, 498; *Com.* v. *Webster*, 5 Cush. 295, 298; *People* v. *Hettick*, 1 Wheeler Cr. C. 399; *People* v. *Melvin*, 2 Wheeler Cr. C. 265; *People* v. *Johnson*, 2 Wheeler Cr. C. 361, 367; *Romaine* v. *State*, 7 Ind. 63; *Stewart* v. *State*, 13 Ark. 720; *Maize* v. *Sewell*, 4 Blackf. 447; *Front* v. *Williams*, 29 Ind. 18.

[1] *Com.* v. *Webster*, 5 Cush. 297; *Winneshiek Ins. Co.* v. *Schueller*, 60 Ill. 473.

[2] *People* v. *Reyes*, 5 Cal. 347, 349.

[3] *Willis* v. *State*, 12 Ga. 444, 448.

[4] *McCausland* v. *McCausland*, 1 Yeates, 372, 378.

[5] *Willis* v. *State*, 12 Ga. 444, 448, per Nisbet, J.

[6] Bouv. L. Dic.

[7] *Willis* v. *State*, *supra*.

§ 8. PREJUDICE AGAINST THE CRIME. — A prejudice entertained by a juror against a particular crime will not constitute a ground of challenge against such juror when called to try an indictment for such offence,[1] nor will it in a civil case growing out of such criminal act.[2] A prejudice against a person who is engaged in a business prohibited by law, arising solely from the fact of his being engaged in such business, is no more than a prejudice against the crime involved in being engaged in the business.[3]

§ 9. PREJUDICE AGAINST A PARTY'S OCCUPATION. — The fact that the juror is prejudiced against the business of the party but not against him is not a sufficient ground of challenge for principal cause.[4] But in a case growing out of the exercise of the obnoxious calling, a juror's prejudices, although nominally directed against the calling itself, may indicate a strong feeling against a person engaged therein. Thus, in an action against a liquor-seller under a statute giving damages under certain circumstances to a wife for the sale of intoxicating liquor to her husband, one juror stated upon his *voir dire* that he considered the business of selling and manufacturing lager beer a perfect nuisance, a curse to the community, and would do all in his power, except raising mobs, to break up the sale of it. The Supreme Court of Illinois was of opinion that a man who would stop short of mob violence only, to suppress the business of another, would inflict damages regardless of the evidence in a case growing out of the calling.[5]

In a civil suit, a prejudice of a juror against a person not a

[1] *United States* v. *Hanway*, 2 Wall. Jr. 139; *Williams* v. *State*, 3 Ga. 453; *Parker* v. *State*, 34 Ga. 262; *United States* v. *Noelke*, 7 Blatch. 554; s. c. 1 Fed. Rep. 426.

[2] *Davis* v. *Hunter*, 7 Ala. 135. In an action for the killing of sheep by dogs, a juror who said that he had such a bias or prejudice about the matter of dogs killing sheep as would interfere with his impartial judgment in the case was held to have been properly excused upon a challenge for cause. *Anson* v. *Dwight*, 18 Iowa, 241.

[3] *United States* v. *Borger* (U. S. Cir. Ct. S. D. N. Y., May, 1881), 7 Fed. Rep. 193; *United States* v. *Duff* (same court, January, 1881), 6 Fed. Rep. 45, 48.

[4] *Maretzek* v. *Cauldwell*, 2 Abb. Pr. N. S. 407; s. c. 5 Robt. 660; *United States* v. *Noelke*, 9 Reporter, 505; *Kroer* v. *People*, 78 Ill. 294.

[5] *Albrecht* v. *Walker*, 73 Ill. 69. See also *Winneshiek Ins. Co.* v. *Schueller*, 60 Ill. 465; *Swigart* v. *State*, 67 Ind. 287; s. c. 21 Alb. L. J. 278; *Keiser* v. *Lines*, 57 Ind. 431. In a similar case a juror is properly rejected whose prejudice against the defendant's business is such that he cannot give the testimony of a person engaged in the same business as the defendant the same weight which he could the testimony of other persons. *Robinson* v. *Randall*, 82 Ill. 515.

party to the suit, although sustaining close business relations with one of the parties, has been held to form no objection to his competency.[1] There would, however, seem to be no good reason why the court should not, in the exercise of its discretion, stand such juror aside, and complete the panel from those free from the suspicion of prejudice.

§ 10. PREJUDICE AGAINST NATIONALITY. — A slight prejudice against people of a particular nationality will not necessarily exclude a juror upon a challenge to the favor on the trial of one of that nationality for a criminal offence. Thus, upon the trial of an Italian for murder, a juror testified in substance that he had had some business relations with the Italians; that they were a race he was "not particularly fond of, and did not think much of, judging from those we have here;" and yet he was allowed to serve.[2]

§ 11. PREJUDICE AGAINST THE CHARACTER OF THE ACCUSED. — It is quite generally considered that an unfavorable impression of the character of an accused person, derived from his general reputation, constitutes no ground of challenge to a juror called for the trial of such person upon a criminal charge. Any other rule would place the most notorious offenders in a position decidedly more advantageous than the law affords to those whose misdeeds have not rendered them infamous. Either they could not be tried at all, or the administration of justice in such cases would necessarily fall to the lot of jurors hopelessly ignorant or strongly in sympathy with the offenders themselves.[3] But jurors thus prejudiced should not be allowed to sit upon the trial of the objects of their unfavorable opinion, unless they are able, for the time being, to lay aside prepossessions of this character, to give the accused a fair trial as guaranteed by law, and render a verdict according to the evidence.[4]

§ 12. OPINIONS WHICH DO NOT DISQUALIFY. — (1) *Lord Mansfield's Standard of Impartiality now impracticable.* — At the outset, it may be remarked that the standard of impartiality as

[1] *Strawn* v. *Cogswell*, 28 Ill. 457.

[2] *Balbo* v. *People*, 19 Hun, 424; s. c. affirmed, 80 N. Y. 484. Compare *People* v. *Christie*, 2 Park. C. R. 579; s. c. 2 Abb. Pr. 256; *People* v. *Reyes*, 5 Cal. 347; *People* v. *Gar Soy* (Sup. Ct. Cal., Dec. 1880), 23 Alb. L. J. 418.

[3] *People* v. *Lohman*, 2 Barb. 450; *People* v. *Knickerbocker*, 1 Park. Cr. R. 302; *People* v. *Allen*, 43 N. Y. 28; *Anderson* v. *State*, 14 Ga. 710; *Willis* v. *State*, 12 Ga. 444; *State* v. *Schnappen*, 22 La. An. 43; *People* v. *Mahoney*, 18 Cal. 180; *State* v. *Davis*, 14 Nev. 439, 450; *Monroe* v. *State*, 23 Tex. 210.

[4] Ibid. See also *Martin* v. *State*, 25 Ga. 424.

stated by Lord Mansfield in *Mylock* v. *Saladine*,[1] has long since ceased to be regarded as attainable.[2]

The courts have uniformly reached the conclusion that with the present means of disseminating information a juror's mind cannot reasonably be expected to be "as white paper."[3] It is no objection to a juror that he has heard much about the case, provided that he has formed no opinion thereon;[4] nor that what he has heard has taken shape in his mind, and impressed itself as a fact. The books afford no better statement of the law upon this point than the language of Chief Justice Marshall upon the trial of Aaron Burr.

(2) *The Rule as declared by Chief Justice Marshall the settled Law.*— "Were it possible," said he, "to obtain a jury without any prepossessions whatever, respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury; but this is perhaps impossible, and therefore will not be required. The opinion which has been avowed by the court is, that light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection to him."[5]

[1] 1 W. Bl. 480, 481. "A juror," said he, "should be as white paper, and know neither plaintiff nor defendant, but judge of the issue merely as an abstract proposition upon the evidence produced before him. He should be superior even to a suspicion of partiality."

[2] In a case decided by the Supreme Court of Pennsylvania in the year 1794, the court remarked: "It were much to be wished that the minds of the jurors should be as white paper, but it can scarcely be expected where they come *de viceneto*." *McCausland* v. *McCausland*, 1 Yeates, 372, 378.

[3] "We must either recede," said Chief Justice Agnew, "and go back to the practice of an age when ignorance of passing events constituted a characteristic of the times, and exclude every juror who has formed any opinion, even the slightest; or we must stand abreast with the present age, when every remarkable event of to-day is known all over the country to-morrow, and exclude those only whose opinions are so fixed as to be pre-judgments, or have been formed upon the known evidence in the cause. It is needless to say the world moves and carries us with it, and if we lag behind we must commit the trial of the most important causes in life to those so ignorant their dark minds have never been smitten by the rays of intelligence." *O'Mara* v. *Com.*, 75 Pa. St. 424, 428. See also *Reynolds* v. *United States*, 98 U. S. 145, 156.

[4] *State* v. *Howard*, 17 N. H. 171; *State* v. *Potter*, 18 Conn. 166; *Com.* v. *Thrasher*, 11 Gray, 57.

[5] Trial of Aaron Burr, vol. i. p. 416. See also *Boon* v. *State*, 1 Ga. 618, 625; *Nelms* v. *State*, 13 Smed. & M. 500, 504; *Smith* v. *Eames*, 4 Ill. 76; *Leach* v. *People*, 53 Ill. 311; *Black* v. *State*, 42 Tex. 377; *State* v. *Desmouchet*, 32 La. An. 1241.

The foregoing expression of opinion by this distinguished jurist, delivered in a case which at the time excited universal attention, has ever since exerted a marked influence upon the determination of questions of this character. Thus it is frequently stated, that if the juror's opinion will "readily yield" to the evidence presented in the case, he is not incompetent to sit upon the trial of the issue.[1] Such an opinion is generally formed from the reading of newspapers, or from any other source of rumor, and is so unsubstantial in its nature that a contradiction from the same source would be as readily accepted as true as the original statement upon which the opinion was formed.[2] Vague and floating rumors, of whose origin the juror has no information, and of whose authenticity he has no just grounds of belief, — although they put on the form of a narrative, and circumstantial detail of the facts, — do not ordinarily produce such an impression on a juror's mind as to affect his impartiality. He may have

[1] *Scranton* v. *Stewart*, 53 Ind. 68; *McGregg* v. *State*, 4 Blackf. 101; *Van Vacter* v. *McKillip*, 7 Ind. 578; *Morgan* v. *Stevenson*, 6 Ind. 169; *Rice* v. *State*, 7 Ind. 332; *Lithgow* v. *Com.*, 2 Va. Cas. 297, 313; *Ulrich* v. *People*, 39 Mich. 245; *State* v. *George*, 8 Rob. (La.) 535; *State* v. *Colman*, 27 La. An. 691, 692; *Guetig* v. *State*, 66 Ind. 94. It would seem plain that a juror whose frame of mind is such that he is in doubt as to whether the opinion he has formed would readily yield to the evidence ought to be excluded. *Dejarnette* v. *Com.* (Sup. Ct. App. Va. 1881), 11 Reporter, 653. Compare *Stout* v. *People*, 4 Park. Cr. R. 71, 111.

[2] *People* v. *Stout*, 4 Park. Cr. R. 71; *People* v. *Johnson*, 2 Wheeler Cr. Cas. 361, 369; *Lowenberg* v. *People*, 5 Park. Cr. R. 414, 423; *Eason* v. *State*, 6 Baxter (Tenn.), 466, 477; *State* v. *Potter*, 18 Conn. 166; *State* v. *Wilson*, 38 Conn. 126; *O'Connor* v. *State*, 9 Fla. 215; *Montague* v. *State*, 17 Fla. 662; *Bradford* v. *State*, 15 Ind. 347; *State* v. *Benton*, 2 Dev. & B. 196; *Morgan* v. *State*, 31 Ind. 193; *Clem* v. *State*, 33 Ind. 418; *Cluck* v. *State*, 40 Ind. 263; *Scranton* v. *Stewart*, 52 Ind. 68; *Fahnestock* v. *State*, 23 Ind. 231; *Meyer* v. *State*, 19 Ark. 156; *State* v. *Spaulding*, 24 Kan. 1; *People* v. *Reynolds*, 16 Cal. 128; *Schoeffler* v. *State*, 3 Wis. 823; *People* v. *Mallon*, 3 Lans. 224; *Lithgow* v. *Com.*, 2 Va. Cas. 297; *Holt* v. *People*, 13 Mich. 224; *King* v. *State*, 5 How. (Miss.) 730; *State* v. *Flower*, Walker (Miss.), 318; *State* v. *Raymond*, 11 Nev. 98; *People* v. *King*, 27 Cal. 507; *People* v. *Williams*, 17 Cal. 142; *State* v. *Morea*, 2 Ala. 275; *Hudgins* v. *State*, 2 Ga. 171; *State* v. *Cockman*, 2 Winst. (N. C.) 95; *State* v. *Ellington*, 7 Ired. L. 61; *Waters* v. *State*, 51 Md. 430; s. c. 8 Reporter, 560; *Little* v. *Com.*, 25 Gratt. 921; *United States* v. *McHenry*, 6 Blatch. 503; *Brown* v. *Com.*, 2 Leigh, 769; *McCune* v. *Com.*, 2 Rob. (Va.) 771; *Irvine* v. *Lumbermen's Bank*, 2 Watts & S. 190; *Wright* v. *State*, 4 Hump. 194; *Cooper* v. *State*, 16 Ohio St. 328; *Frazier* v. *State*, 23 Ohio St. 551; *State* v. *Dove*, 10 Ired. L. 469; *Hart* v. *State*, 57 Ind. 102; *State* v. *Bone*, 7 Jones L. 121; *State* v. *Collins*, 70 N. C. 241; *Sanchez* v. *People*, 2 Park. Cr. R. 535; *Union Gold M. Co.* v. *Rocky Mountain Nat. Bank*, 2 Col. 565; *State* v. *Johnson*, Walker, 392; *Sam* v. *State*, 13 Smed. & M. 189; *Lee* v. *State*, 45 Miss. 114; *State* v. *Bunger*, 13 La. An. 461; s. c. 14 La. An. 462; *State* v. *Lartigue*, 29 La. An. 642; *State* v. *Hinkle*, 6 Iowa, 380; *State* v. *Sater*, 8 Iowa, 420; *State* v. *Lawrence*, 38 Iowa, 51; *McGregg* v. *State*, 4 Blackf. 101; *Plummer* v. *People*, 74 Ill. 361; *Thompson* v. *State*, 24 Ga. 297; *People* v. *McCauley*, 1 Cal. 379; *Skinner* v. *State*, 53 Miss. 399; *State* v. *Hoyt*, 47 Conn. 518.

formed an opinion upon the hypothesis that the rumors are true; but such impression is usually removed when the facts of the case, as developed by the evidence, wholly contradict the rumors.[1]

(3) *This Rule to be guardedly applied.* — The application of the foregoing rule must be closely watched. Not every opinion formed upon this unsubstantial basis can be readily discarded. Much depends upon the temperament of the individual juror. If the state of the juror's mind is such that he has fully determined the issue to be tried, he is as surely disqualified to sit in the case when that conclusion is reached, from belief of the shallowest sort of rumors, as when formed from the most authentic source.[2] Moreover, it has been observed by conservative judges that this rule is an innovation, and is therefore to be strictly confined within its proper limits. "The courts have gone to the verge of the law," said Nicholson, J., "in holding that a juror who has formed and expressed an opinion on mere rumor may be an impartial juror. We recognize such to be the settled law, but we are not disposed to go further in that direction."[3] However, in the view of the Virginia court, when the opinion is founded on common rumor, the presumption is that it is merely hypothetical, and it will be so considered in the absence of evidence to the contrary.[4]

§ 13. Nature of Disqualifying Opinion. — We have hitherto considered that character of opinion which the law does not now regard as affecting the juror's competency. Necessarily we have, at the same time, contrasted it with that which is regarded as having a disqualifying effect. It is proper to consider the latter distinctly. The character of opinion which will form a subject of challenge for principal cause has been variously stated. Thus, it must be "fixed and settled;"[5] "fixed and absolute;"[6] "fixed and determined;"[7] "fixed and positive;"[8] "decided;"[9] "substantial,"[10] or deliberately formed.[11]

[1] *Payne* v. *State*, 3 Hump. 375.

[2] See *post*, § 13.

[3] *Eason* v. *State*, 6 Baxter (Tenn.), 466, 477.

[4] *Jackson* v. *Com.*, 23 Gratt. 919, 928; *Wright* v. *Com.*, 32 Gratt. 941, 943.

[5] *Schoeffler* v. *State*, 3 Wis. 823; *People* v. *King*, 27 Cal. 507.

[6] *People* v. *Bodine*, 1 Den. 308; *State* v. *Howard*, 17 N. H. 192.

[7] *Staup* v. *Com.*, 74 Pa. St. 458.

[8] *Rafe* v. *State*, 20 Ga. 60.

[9] *Osiander* v. *Com.*, 3 Leigh, 780; *Armistead* v. *Com.*, 11 Leigh, 657; *Lithgow* v. *Com.*, 2 Va. Cas. 297.

[10] *Sprouce* v. *Com.*, 2 Va. Cas. 375; *Jackson* v. *Corinth*, 23 Gratt. 919; *Thompson* v. *Updegraft*, 3 W. Va. 629; *Brown* v. *Com.*, 2 Leigh, 769.

[11] *State* v. *George*, 8 Rob. 535; *State* v. *Brown*, 4 La. An. 505; *Wright* v. *State*, 18 Ga. 383.

Of course all of these terms are intended to convey one and the same idea. Smith, J., speaking of the disqualifying opinion, said: "This, it is well settled in numerous cases, must be a fixed, absolute, positive, definite, settled, decided, unconditional opinion. The rule is uniformly laid down by the use of one of these words, or words of equivalent force. A conditional, contingent, hypothetical, indeterminate, floating, indefinite, uncertain opinion will not do, nor an impression."[1]

It is only when doubt is entertained as to the fixedness of the opinion that the source of it will throw light upon its disqualifying character.[2] When it is proved or admitted that the mind has formed an opinion of this positive character, the juror may properly be excluded. In such a case the consideration of the *source* of the opinion is quite unprofitable and unnecessary.[3] That source may be of the highest authenticity, or it may be the shallowest kind of rumor. If the former, it is evident that what the mind has once taken in and digested will be certainly reproduced upon the trial, and will bring conviction with redoubled force. If the latter, the juror has shown himself to be a person of such marvellous credulity that the event of his adjudication upon the rights of litigants must be wholly unfounded upon rational speculation, and, in general, the sport of chance.[4]

[1] *People* v. *Stout*, 4 Park. Cr. R. 71, 117. See also *State* v. *Kingsbury*, 58 Me. 238. Judges frequently use the term "opinion" as synonymous with "fixed opinion." See *Reynolds* v. *State*, 1 Ga. 222, with which decision compare *Hudgins* v. *State*, 2 Ga. 173, 180; *Maddox* v. *State*, 32 Ga. 581.

[2] *Wormley's Case*, 10 Gratt. 658, 687.

[3] *Boon* v. *State*, 1 Ga. 631; *Logan* v. *State*, 50 Miss. 269, 275; *Lycoming Fire Ins. Co.* v. *Ward*, 90 Ill. 545; *Leach* v. *People*, 53 Ill. 311; *Smith* v. *Eames*, 4 Ill. 76; *Carson* v. *State*, 50 Ala. 134; *Hall* v. *State*, 51 Ala 9; *State* v. *Davis*, 14 Nev. 439, 450; *Payne* v. *State*, 3 Humph. 375; *Rice* v. *State*, 1 Yerg. 432; *McGowan* v. *State*, 9 Yerg. 184; *Coleman* v. *Hagerman*, MS., cited in 6 Cow. 564; *People* v. *Mather*, 4 Wend. 229, 244; *Greenfield* v. *People*, 74 N. Y. 277; *Northfleet* v. *State*, 4 Sneed, 340; *Sam* v. *State*, 31 Miss. 480; *Goodwin* v. *Blachley*, 4 Ind. 438; *Meyer* v. *State*, 19 Ark. 156; *Fouts* v. *State*, 7 Ohio St. 471; *Armistead* v. *Com.*, 11 Leigh, 657; *Staup* v. *Com.*, 24 Pa. St. 458; *People* v. *Mallon*, 3 Lans. 224; *Lithgow* v. *Com.*, 2 Va. Cas. 297; *Sprouce* v. *Com.*, 2 Va. Cas. 375; *Conway* v. *Clinton*, 1 Utah, 215; *Wright* v. *Com.*, 32 Gratt. 941; *Jackson* v. *Com.*, 23 Gratt. 319; *Gardner* v. *People*, 4 Ill. 84; *Neely's Case*, 13 Ill. 685. But see *Clore's Case*, 8 Gratt. 607.

[4] Trial of Aaron Burr, p. 370; *Moses* v. *State*, 10 Humph. 456; s. c. 11 Humph. 232; *McGowan* v. *State*, 9 Yerg. 184; *Payne* v. *State*, 3 Humph. 375; *Balbo* v. *People*, 80 N. Y. 484, 492, 493, per Andrews, J.; *State* v. *McClear*, 11 Nev. 39, 67; *Logan* v. *State*, 50 Miss. 269, 275; *State* v. *Brette*, 6 La. An. 652; *Gray* v. *People*, 26 Ill. 344; *Armistead* v. *Com.*, 11 Leigh, 657; *Maddox* v. *State*, 32 Ga. 581; *Neely* v. *People*, 13 Ill. 685. It is believed that the foregoing is a fair statement of the result of the authorities. Cases may be found, however, which can hardly be reconciled with it. Thus, on the trial of certain negroes for having killed their master, a juror stated that he had heard

§ 14. An Hypothetical Opinion. — We have hitherto seen that an opinion based upon rumor may or may not have a disqualifying effect, according to the fixedness of it. To determine whether the opinion formed or expressed is of a disqualifying character is frequently a matter calling for the application of very nice discrimination. It is often said that an hypothetical opinion will not disqualify a juror. Thus, in a civil case, a juror was challenged because he had said that the defendant was wrong and the plaintiff was right; but upon examination it appeared that he had said that he had no personal knowledge of the matter in dispute, but that if the reports of the neighbors were correct, the defendant was wrong and the plaintiff was right. This was held to be an hypothetical opinion, and, as such, not to affect the juror's competency.[1]

But unless care be exercised by the trial judge, persons who have formed absolute and settled opinions upon the issue to be tried will find their way into the jury-box, upon the misconception that such opinions are hypothetical merely. Few have any personal knowledge of what is heard and read by them from day to day. In one sense, therefore, it may be said that all opinions based upon hearsay are hypothetical. They are certainly contingent upon the truth of what has been heard. People, however, frequently form violent prejudices from hearsay alone. When called as a juror, one entertaining such prejudices does not render himself competent by the simple statement, "If what I have

that these negroes had done the deed; that he *believed* it then, did at the time of the trial, and "could not do otherwise, as he had the evidence of the country." ["Evidence" was probably here used as synonymous with rumor.] That from such fact he had formed an opinion which had created a bias upon his mind which yet remained. This juror was held to be competent, because the opinion, belief, bias, &c., arose from *rumor*. The court seemed to consider it a matter of slight consequence as to the character of the opinion formed, so long as it was not based upon authentic information. *Alfred* v. *State*, 2 Swan (Tenn.), 581. See also *Major* v. *State*, 4 Sneed, 340; *People* v. *Hayes*, Edm. Sel. Cas. 582; *Carson* v. *State*, 50 Ala. 134; *Curley* v. *Com.*, 84 Pa. St. 151. These cases can be supported only upon the ground that a "belief" is not synonymous with a "fixed opinion." It would hardly seem that this distinction can be maintained. See *Neely* v. *People*, 13 Ill. 685; *Bales* v. *State*, 63 Ala. 30, 36. In the California Penal Code "belief" is used as synonymous with "unqualified opinion." Ibid. § 1074, subsec. 8.

[1] *Durell* v. *Mosher*, 8 Johns. 445. See also *Com.* v. *Hughes*, 5 Rand. 655; *People* v. *Johnson*, 2 Wheeler Cr. Cas. 361, 369; *People* v. *Fuller*, 2 Park. Cr. R. 16; *Mann* v. *Glover*, 14 N. J. L. 195; *State* v. *Spencer*, 21 N. J. L. 197; *Burk* v. *State*, 27 Ind 430; *State* v. *Williams*, 3 Stew. (Ala.) 454; *Osiander* v. *Com.*, 3 Leigh, 780; *State* v. *Flower*, Walker (Miss.), 318; *People* v. *Murphy*, 45 Cal. 137; *Jackson* v. *Corinth*, 23 Gratt. 919; *Moran* v. *Com.*, 9 Leigh, 651; *Loeffener* v. *State*, 10 Ohio St. 598; *State* v. *Ostrander*, 18 Iowa, 435; *State* v. *Hoyt*, 47 Conn. 518.

heard is true, I have formed an opinion; but if not true, I have formed none." This statement is by no means conclusive of a juror's competency. It does not necessarily show that the opinion formed is hypothetical, in the sense that a hypothetical opinion will not disqualify. On the contrary, the expression may have been designedly used to cover the rankest prejudices,[1] which further probing may develop. He should be asked whether in fact he believes what he has heard to be true; whether that belief is of such a character as would prevent its being removed by contrary evidence; and, in doubtful cases, inquiry might be instituted as to the grounds of his belief.

§ 15. Opinions based upon Personal Knowledge. — The old rule as laid down by Sergeant Hawkins was, that if a juryman declared his opinion beforehand that the party was guilty, that he would be hanged, or the like, it was a good cause of challenge.[2] But this was stated with a marked qualification, that if it should appear that the juror made such declaration from his knowledge of the cause, and not out of any ill-will to the party, it was no cause of challenge.[3] This was cited with approval as late as 1821, by Lord Tenterden, in *Rex* v. *Edmonds*,[4] and still later in this country.[5] However true this may have been at an early day, when jurors were summoned rather in the capacity of witnesses than as impartial judges of the facts in dispute, it certainly has never been a generally recognized rule in this country. The question is not, according to the spirit of our law, whether the juror feels any resentment or prejudice without cause against either party, but whether from any cause the juror has a bias of mind that may disqualify him from deciding with strict impartiality.[6]

[1] *Trimble* v. *State*, 2 G. Greene, 404; *Armistead* v. *Com.*, 11 Leigh, 657; *People* v. *Johnston*, 46 Cal. 78; *Gardner* v. *People*, 4 Ill. 83; *Rothschild* v. *State*, 7 Tex. App. 519; *Moses* v. *State*, 10 Humph. 456; *Neely* v. *People*, 13 Ill. 685; *Brown* v. *State*, 70 Ind. 577; *State* v. *Ricks*, 32 La. An. 1098. But see *Epes's Case*, 5 Gratt. 676; *Smith* v. *Com.*, 6 Gratt. 696; *Smith* v. *Com.*, 7 Gratt. 593.

[2] 2 Hawk. P. C. ch. 43, § 28; *Cook's Case*, 13 How. St. Tr. 333; *Barbot's Case*, 18 How. St. Tr. 1233; *Layer's Case*, 16 How. St. Tr. 137; *O'Coigly's Case*, 26 How. St. Tr. 1227; *Horne Tooke's Case*, 25 How. St. Tr. 17.

[3] 2 Hawk. P. C. ch. 43, § 28. See also Brooke's Abr., Challenge, pl. 90, citing 21 H. VII. 29; Bac. Abr., Juries, E. 5.

[4] 4 Barn. & Ald. 471, 490. See also Brooke's Abr., Challenge, 55, and Fitzherbert's Abr., Challenge, 22, citing the charge of Babington to the triors in the Year Book, 7 Hen. VI. fol. 25; Trials per Pais, 189.

[5] *State* v. *Spencer*, 21 N. J. L. 196, 198; *State* v. *Fox*, 25 N. J. L. 566; *Pettis* v. *Warren*, Kirby, 426. See also *State* v. *Howard*, 17 N. H. 171, 192.

[6] Trial of Aaron Burr, vol. i. p. 414, opinion of Marshall, C. J.; *Blake* v. *Millspaugh*, 1 Johns. 316; *Durrell* v. *Mosher*, 8

§ 16. IMPRESSION — MEANING OF THIS TERM. — When one speaks of an "impression" upon his mind, he usually means something which does not amount to a fixed or settled opinion.[1] Jurors, however, upon examination on the *voir dire*, are apt to use this term as synonymous with "opinion." If, therefore, an analysis of their "impressions" shows that they are in the nature of settled opinions, they must be treated as such, and the juror excluded. Thus, the New York Court of Appeals, reviewing the evidence upon the trial of the competency of certain jurors, who testified to their "impressions" as to the guilt of the prisoner, said: "There had been an effect produced upon their minds which remained, and which was so firmly lodged there that it needed an incoming force to dislodge it. They had received it into their minds as true that the prisoner was guilty, without certain knowledge of it, but upon proofs which they held satisfactory. And it matters not what the state of mind thus produced is christened, whether an opinion or an impression. There was existing such a decision of mind as to his guilt, as that further proofs must be produced, before that decision would be changed. So that we are justified in treating the conclusions of these jurors as to the guilt of the plaintiff in error as equivalent to what the books call an opinion, when treating of this subject."[2]

Conversely, a juror may state upon his examination that he has formed an "opinion" as to the guilt or innocence of the party upon trial, when in reality he has received only a slight impression, which cannot properly have any disqualifying effect. Thus, a man is slain, and the defendant, having been accused of the crime, attempts to escape, but is apprehended. A juror having heard these simple facts expresses himself to the effect that the accused is guilty of the offence charged. Having heard no other facts in the case, it is obvious that a positive opinion has not been formed. A simple impression only has been received, notwithstanding the juror may dignify his conclusion as an "opinion."[3]

Johns. 445; *Ex parte Vermilyea*, 6 Cow. 555; *People* v. *Mather*, 4 Wend. 229, 241; *People* v. *Van Alstyne*, MS., cited in 6 Cow. 565; *People* v. *Vermilyea*, 7 Cow. 108; *Solander* v. *People*, 2 Col. 48, 59; *Boon* v. *Georgia*, 1 Ga. 618, 622; *State* v. *Williams*, 3 Stew. 454; *Waters* v. *State*, 51 Md. 430; *Hudgins* v. *State*, 2 Ga. 173.

[1] *People* v. *Honeyman*, 3 Denio, 121; *People* v. *Symonds*, 22 Cal. 348; *Gold Mining Co.* v. *Nat. Bank*, 96 U. S. 640; *Noe* v. *State*, 4 How. (Miss.) 330; *White* v. *State*, 52 Miss. 216; *State* v. *Ward*, 14 La. An. 673; *State* v. *Coleman*, 27 La. An. 691; *State* v. *Hugel*, 27 La. An. 375; *State* v. *Medlicott*, 9 Kan. 257.

[2] *Greenfield* v. *The People*, 74 N. Y. 277, 283.

[3] *Payne* v. *The State*, 3 Humph. 375; *State* v. *Wilson*, 38 Conn. 126, 138; *North-*

This point was noticed by Chief Justice Shaw in the celebrated trial of Professor Webster for the murder of Dr. Parkman. "The opinion or judgment," said he, "must be something more than a vague impression, formed from casual observation with others, or from reading imperfect, abbreviated newspaper reports. It must be such an opinion upon the merits of the question as would be likely to bias or pervert a candid judgment upon a full hearing of the evidence. If one has formed what in some sense might be called an opinion, but which yet fell far short of exciting any bias or prejudice, he might conscientiously discharge his duty as a juror." [1]

An "indefinite" opinion does not disqualify.[2] Strictly speaking, there is no such thing as an indefinite opinion. Such a state of mind may be more exactly characterized as an impression upon the mind as to the existence or non-existence of facts.

§ 17. Opinions which may be removed by Evidence. — Strenuous efforts have been made to establish some test other than the direct interrogatory, "Have you a fixed opinion?" &c., which may show the condition of the juror's mind. Some courts think they have found this in the question, "Is your opinion of such a character that it will require evidence to remove it?" It has been considered that if the state of the juror's mind is that he regards the accused as guilty, and would so render a verdict unless evidence appeared to the contrary; in other words, if he has an impression of the defendant's guilt which it will require evidence to remove, — such a bias of mind is incompatible with the presumption of innocence which the law interposes for the benefit of accused persons.[3] This principle has

fleet v. *The State*, 4 Sneed, 340, 343; *Palmer* v. *The People*, 4 Neb. 68, 75; *Com.* v. *Lenox*, 3 Brewst. 249; *United States* v. *Reynolds*, 1 Utah, 319.

[1] *Com.* v. *Webster*, 5 Cush. 295, 297. See also *State* v. *Pike* (Sup. Ct. N. H.), 11 Am. L. Reg. 233, and particularly the opinion of Lomax, J., in *Clore's Case*, 8 Gratt. 606, 617.

[2] *State* v. *Hoyt*, 47 Conn. 518.

[3] *United States* v. *Wilson*, Baldwin, 85; *People* v. *Mather*, 4 Wend. 229; *Eason* v. *The State*, 6 Baxter (Tenn.), 466, 476; *Com.* v. *Knapp*, 9 Pick. 496; *Cotton* v. *State*, 31 Miss. 504; *White* v. *Moses*, 11 Cal. 68; *Fahnestock* v. *State*, 23 Ind. 231; *Armistead* v. *Com.*, 11 Leigh, 657; *People* v. *Mallon*, 3 Lans. 224; *Stephens* v. *People*, 38 Mich. 739; *People* v. *Cottle*, 6 Cal. 227; *People* v. *Gehr*, 8 Cal. 359; *Conway* v. *Clinton*, 1 Utah, 215; *Rothschild* v. *State*, 7 Tex. App. 519; *United States* v. *Hanway*, 2 Wall. Jr. 139; *Ruff* v. *Rader*, 2 Mont. 211; *Moses* v. *State*, 10 Humph. 456; *Sam* v. *State*, 3 Smed. & M. 189; *Alfred* v. *State*, 37 Miss. 296; *State* v. *Bunger*, 11 La. An. 607; *Collens* v. *People*, 48 Ill. 145; *Gray* v. *People*, 26 Ill. 344.

been carried to lengths which can hardly be justified. Thus, upon one occasion the juror stated upon the cross-examination that he had no fixed opinion, but qualified this statement by saying, "none which could not be removed by evidence;" it was held that he ought to have been excluded.[1]

Other decisions show that the test here noticed is not regarded as infallible. Referring to the language of Chief Justice Marshall in a previous section,[2] it will be seen that he considered that impressions which would *yield* to the testimony did not affect the juror's competency. From this it is evident that the juror might without impeachment admit the existence of an impression or an opinion (a synonymous term for "impression," as frequently used by jurors) which it would require evidence to remove. As pithily stated in a late case, "The fact that it would take evidence to remove an opinion would appear to be only the natural adjunct of every opinion formed upon rumor."[3]

§ 18. A Disqualifying Opinion cannot be laid aside. — It is a fundamental rule of law that the juror "must stand indifferent as he stands unsworn;"[4] therefore no inquiry can be tolerated whether the firmness of the man may not enable him to give a true verdict upon his oath, notwithstanding his previous opinions. It being conceded or proved that the juror holds such an opinion as disqualifies him from sitting in the case, the inquiry as to the juror's competency is ended, and the juror must be rejected.[5] As observed by Chief Justice Marshall upon the trial of Aaron Burr, "He may declare that notwithstanding these prejudices he is determined to listen to the evidence and be governed by it; but the law will not trust him. . . . He will listen with more favor to that testimony which confirms, than to that which would change his opinion. It is not to be expected

[1] *Cancemi* v. *People*, 16 N. Y. 501.

[2] *Ante*, § 12, subsec. (2).

[3] Per Lewis, P. J., in *State* v. *Barton*, 8 Mo. App. 15, 17; s. c. 71 Mo. 288. See also *State* v. *Core*, 70 Mo. 491; *State* v. *Davis*, 29 Mo. 397; *State* v. *Carson*, 50 Ala. 134; *Reynolds* v. *United States*, 98 U. S. 145; *Curley* v. *Com.*, 84 Pa. St. 151 (the juror Lorah); *Ortwein* v. *Com.*, 76 Pa. St. 414; *Estes* v. *Richardson*, 6 Nev. 128; *People* v. *King*, 27 Cal. 507; *Wilson* v. *State*, 94 Ill. 299; *Ogle* v. *State*, 33 Miss. 383; *Thomas* v. *State*, 36 Tex. 316; *O'Mara* v. *Com.*, 75 Pa. St. 424; *Myers* v. *Com.*, 79 Pa. St. 308; *State* v. *Lawrence*, 38 Iowa, 51; *State* v. *Medlicott*, 9 Kan. 257; *Guetig* v. *State*, 66 Ind. 94; *People* v. *Brown*, 48 Cal. 253; *People* v. *Welch*, 49 Cal. 174.

[4] Co. Litt. 157 *b*.

[5] *Com.* v. *Lesher*, 17 Serg. & R. 155, 166; *United States* v. *Wilson*, Bald. 84; *Rothschild* v. *State*, 7 Tex. App. 519; *People* v. *Johnston*, 49 Cal. 78.

that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case." [1]

In an early Tennessee case the bill of exceptions showed that the jurors, after admitting the existence of a disqualifying opinion, were, against the objection of the prisoner, asked the question, "Do you think, notwithstanding your opinion, you are in a condition to try this cause impartially?" Peck, J., keenly observed upon this record: "What is the condition of a juror when such a question is propounded? He will feel it as an appeal made to his pride and magnanimity. He will naturally imagine he can. Nay, he will suppose he has already divested himself of his prepossessions, and he will answer in the affirmative. But who that has taken the slightest view of human nature can help seeing that immediately upon hearing a repetition of the same evidence which first raised his prepossessions, they will return upon him; or, placing himself upon his resolution, he will err on the other side, and reject the evidence which, but for the appeal to his pride, would have had due weight." [2]

§ 19. Opinion derived from an Authentic Source. — If an opinion formed or expressed be derived from a reliable

[1] Burr's Trial, vol. i. p. 416. See also *Fouts* v. *State*, 7 Ohio St. 471; *Trimble* v. *State*, 2 Greene, 404; *Staup* v. *Com.*, 74 Pa. St. 458; *People* v. *Gehr*, 8 Cal. 359; *Baker* v. *Harris*, 1 Winst. (N. C.) 277; *Conway* v. *Clinton*, 1 Utah, 215; *Cotton* v. *State*, 32 Tex. 614; *Black* v. *State*, 42 Tex. 377; *Goodwin* v. *Blachley*, 4 Ind. 438; *Irvine* v. *Kean*, 14 Serg. & R. 292; *Sam* v. *State*, 13 Smed. & M. 189, 194; *Alfred* v. *State*, 37 Miss. 296; *Logan* v. *State*, 50 Miss. 275; *State* v. *Bunger*, 11 La. An. 607; *Eason* v. *State*, 6 Baxter, (Tenn.) 466, 476; *People* v. *Weil*, 40 Cal. 268; *Stephens* v. *People*, 38 Mich. 739.

[2] *Rice* v. *The State*, 1 Yerg. 432, 434. The penetrating mind of Aaron Burr, when on trial for treason against the United States, appreciated the force of this last proposition, as will be seen from the following extract from the report of his trial: "Mr. Bott (a juror): 'I have gone as far as to declare that Col. Burr ought to be hanged.' Mr. Burr: 'Do you think that such declarations would now influence your judgment? Would not the evidence alter your opinion?' Mr. Bott: 'Human nature is very frail. I know that the evidence ought, but it might or might not influence me. I have expressed myself in this manner, perhaps, within a fortnight; and I do not consider myself a proper juryman.' Mr. Burr: '. . . I will take Mr. Bott, under the belief that he will do me justice."' 1 Burr's Trial, 426. In *State* v. *Allen*, 46 Conn. 531, a juror, having been found to be incompetent by reason of his having expressed an opinion that the defendant was guilty, as charged in the indictment, was discharged. Afterwards, the counsel for the defendant consented to waive the ground of challenge, and asked that he be placed upon the jury. This the court discreetly refused to do, and the Supreme Court held that the offer came too late, Beardsley, J., saying: "He (the juror) would regard himself as well as the accused as on trial, and his verdict would be quite as likely to be shaped by personal considerations and a desire to vindicate himself, as by the evidence and the law in the case." Ibid. p. 549.

source, this is, in general, a good ground of objection to a juror.[1] Of this character are opinions formed from hearing the evidence upon a former trial of the same case,[2] or from conversing with witnesses.[3] Likewise, an opinion formed on the information of one who heard the witnesses testify, or speak of the subject, may be equally a ground of objection, if the juror had confidence in the statement as made. An opinion so formed is not based on common rumor.[4]

In a civil suit, a juror who, upon a statement of facts submitted by one of the parties, has expressed an opinion as to the liability of the other, may be regarded as having derived the information upon which his opinion is based from one who, of all persons, may be supposed to be the best acquainted with the facts.[5]

§ 20. Opinion based upon Reports of Testimony of Witnesses. — There is no doubt that mere newspaper reports of the facts of a case, civil or criminal, gathered by the industry of reporters from every conceivable source, cannot be regarded as

[1] *Troxdale* v. *State*, 9 Humph. 411.

[2] *Ex parte Vermilyea*, 6 Cow. 555; *People* v. *Vermilyea*, 7 Cow. 121; *Grissom* v. *State*, 4 Tex. App. 374; *Jackson* v. *Corinth*, 23 Gratt. 919; *Apperson* v. *Logwood*, 12 Heisk. 262; *Lloyd* v. *Nourse*, 2 Rawle, 49; *Garthwaite* v. *Tatum*, 19 Ark. 336; *Irvine* v. *Kean*, 14 Serg. & R. 292; *State* v. *McClear*, 11 Nev. 39, 67; *McGuffie* v. *State*, 17 Ga. 497; *State* v. *Freeman*, 13 N. H. 491; *Studley* v. *Hall*, 22 Me. 198; *Sam* v. *State*, 13 Smed. & M. 189.

[3] *People* v. *Johnston*, 46 Cal. 78; *Logan* v. *State*, 50 Miss. 275; *State* v. *George*, 8 Rob. (La.) 535, 537; *Goodwin* v. *Blackley*, 4 Ind. 438; *Bishop* v. *State*, 9 Ga. 121. But see *State* v. *Guidry*, 28 La. An. 630. The mere circumstance that a juror has listened to the testimony, or has conversed with witnesses in a case, is not a cause of challenge, if he has formed no opinion based upon such testimony or conversation. *Page* v. *Com.*, 27 Gratt. 954; *Thompson* v. *People*, 23 Ill. 60; *Parchman* v. *State*, 2 Tex. App. 228; *Shields* v. *State*, 8 Tex. App. 427; *Harper* v. *Kean*, 11 Serg. & R. 280; *Ray* v. *State*, 2 Kan. 405; *Lycoming Ins. Co.* v. *Ward*, 30 Ill. 545; *State* v. *Ayer*, 23 N. H. 301; *Com.* v. *Reid*, 8 Phila. 385; *United States* v. *Duff* (U. S. Cir. Ct. S. D. New York, Jan. 1881, Benedict, D. J.), 6 Fed. Rep. 45. In one case the juror stated upon the *voir dire* that he had formed no decided opinion; that he had heard a part of the evidence of one witness, and had formed "an impression" that if the balance of the testimony "should run in that way" that impression would be confirmed; that as far as the evidence went he had a "decided" opinion, if the rest did not run against it; that he had no prejudice, had expressed no opinion, and was prepared to decide the case according to the evidence which might be given, uninfluenced by the portion which he had heard. He was held to be a competent juror. *Moran's Case*, 9 Leigh, 651. See also *McCune* v. *Com.*, 2 Rob. (Va.) 771; *Monroe* v. *State*, 23 Tex. 10.

[4] *Nelms* v. *State*, 13 Smed. & M. 500, 504; *Quesenburg* v. *State*, 3 Stew. & Port. 308; *Sam* v. *State*, 13 Smed. & M. 189; *Ned* v. *State*, 7 Porter, 187. But see *Jackson* v. *Corinth*, 23 Gratt. 919.

[5] *Rogers* v. *Rogers*, 14 Wend. 131; *Young* v. *Marine Ins. Co.*, 1 Cranch C. C. 452.

so "authentic" that an opinion based thereon, not positive in its character, will have a disqualifying effect.[1] But how is it in regard to a newspaper report of the testimony of witnesses, say in a criminal case, developed upon a preliminary examination of the accused, a coroner's inquest, or a previous trial? Here again, there is a conflict of authority. In *Staup* v. *Commonwealth*,[2] the juror stated that he had formed an opinion as to the guilt of the accused from reading in a newspaper the evidence upon a former trial; that it would take some evidence to the contrary to remove this opinion; that it would not, however, bias or influence his judgment. This was held to have disclosed sufficient to disqualify the juror.[3]

On the other hand, the Texas Court of Appeal in a case of recent date held that a juror was not disqualified who stated that he had read a newspaper version of the evidence adduced on the prisoner's application for bail, from which he had formed an opinion in the case; that he had forgotten the evidence, but remembered his opinion; that he did not think this opinion would influence his verdict; that his final decision would be controlled by the evidence; but if the evidence should be the same as he had read, it would require other evidence to change his opinion.[4]

§ 21. Belief that the Accused is Innocent. — In all criminal trials, without exception, there is precisely the same right of challenging a juror for cause given to the State, or to the prosecution, which is given to the defendant. In the matter of selecting a jury, the accused generally enjoys an advantage over the prosecution in the number of peremptory challenges. In all other respects there is an equality of right, and, as has been frequently said, "It is difficult to find any sufficient reason for requiring the State to submit its cause to a jury composed of men who have determined in advance to acquit, which would not equally justify

[1] *Ante*, § 12, subsec. (2).

[2] 74 Pa. St. 458. Compare with this case *Myers* v. *Com.*, 79 Pa. St. 308.

[3] See also *State* v. *Clark*, 42 Vt. 629; *Greenfield* v. *People*, 74 N. Y. 277 (compare *Balbo* v. *People*, 19 Hun, 424; s. c. 80 N. Y. 484); *Carroll* v. *State*, 4 Neb. 31; *Smith* v. *State*, 5 Neb. 181; *Guetig* v. *State*, 66 Ind. 94. In Ohio, a juror is rendered incompetent by statute who forms an opinion from reading reports of the testimony of witnesses as to the facts of the case. Laws 1872, p. 11. This includes newspaper reports. *Frazier* v. *State*, 23 Ohio St. 551.

[4] *Grissom* v. *State*, 4 Tex. App. 374. See also *Smith* v. *Com.*, 6 Gratt. 697; *Smith* v. *Com.*, 7 Gratt. 593; *State* v. *Brown*, 70 Mo. 454; *Reynolds* v. *United States*, 98 U. S. 145; *Ortwein* v. *Com.*, 76 Pa. St. 414.

a requirement of the accused that he should submit to be tried by a jury predetermined to convict.[1]

A specious argument is sometimes based upon the presumption of innocence which the law interposes for the benefit of accused persons. Thus, upon the trial of Aaron Burr, the defendant addressed the court as follows: "The law presumes every man to be innocent, until he has been proved to be guilty. According to the rules of law, it is the duty of every citizen who serves on this jury to hold himself completely unbiassed; it is no disqualification, then, for a man to come forward and declare that he believes me to be innocent."[2] This contention, however, was briefly disposed of by Chief Justice Marshall. "The law," said he, "certainly presumes every man to be innocent till the contrary be proved; but if a juryman give an opinion in favor of the prisoner, he must be rejected."[3]

§ 22. A Feeling of Lenity. — The expression of a wish or desire that a party may prevail is more plainly a cause of challenge than a deliberate expression of opinion that such party ought to prevail.[4] One who had expressed an opinion that a person who had been convicted and sentenced for a criminal offence has been sufficiently punished therefor, and who had signed a petition for his pardon, is not competent to sit as a juror upon the trial of a civil action against the same person founded upon the criminal act.[5]

§ 23. The Juror unwilling to trust himself. — Jurors have been held to be competent who believed that they would be guided by the evidence if sitting upon the jury, but at the same time expressed a feeling of unwillingness to trust themselves, on account of certain sympathies for one of the parties.[6] "This remark," said Brockenbrough, J., dissenting from his brethren,[7] "is such an one as almost any man of delicacy and uprightness would have made of himself in such a situation. The remark, if accompanied by an open and ingenuous manner, would seem to indicate that the venire-man would cautiously keep watch on

[1] *State* v. *West*, 69 Mo. 401, 403, per Henry, J. See also *Com.* v. *Lesher*, 17 Serg. & R. 155; *Commander* v. *State*, 60 Ala. 1.

[2] 1 Burr's Trial, p. 425.

[3] Ibid.

[4] *Pike County* v. *Griffin, &c. Plank Rd. Co.*, 15 Ga. 39.

[5] *Asbury Ins. Co.* v. *Warren*, 66 Me. 523.

[6] *Com.* v. *Webster*, 5 Cush. 295, 298; *Montague* v. *Com.*, 10 Gratt. 767, overruling upon this point *Lithgow* v. *Com.*, 2 Va. Cas. 297.

[7] 2 Va. Cas. 313.

his own feelings and prepossessions, and is entirely compatible with a high sense of justice, and a scrupulous impartiality."

The contrary, however, is maintained in other cases.[1] Thus, a juror who upon examination testifies that he has conscientious scruples as to finding a verdict in a capital case is incompetent, although upon further examination he states that his scruples consist only in tender feelings towards the prisoner, — a fear that he may do him wrong.[2] And so, although he declares that if forced to serve, and sworn to render a verdict according to the evidence, he would respect his oath; at the same time adding, "but I should not feel willing to be sworn in the case."[3] In such a case, it has been observed, the juror's standard of evidence is unknown, and may be as far removed from the legal and general sense of justice as are his scruples.[4]

§ 24. A Preference in Case the Evidence is evenly balanced. — A juror who declares that his feeling for one of the parties is such that if the evidence in the case were evenly balanced, his mind would incline in favor of that party, but who at the same time states that if the evidence were against such party, he would so decide the case, and would do his duty as a juror under the instructions of the court, has been held not incompetent.[5] The soundness of this conclusion may be doubted. It is, in general, a good cause of challenge that, unaffected by evidence, the mind of the juror will "lean" one way or the other.[6] It may happen that the burden of proof lies upon that

[1] *McLaren* v. *Birdsong*, 24 Ga. 265; *Edwards* v. *Farrar*, 2 La. An. 307; *Dejarnette* v. *Com.* (Sup. Ct. App. Va. 1881), 11 Reporter, 653.

[2] *O'Brien* v. *People*, 36 N. Y. 276.

[3] *Walter* v. *People*, 32 N. Y. 147; s. c. 6 Park. C. R. 15; 18 Abb. Pr. 147.

[4] *O'Brien* v. *People*, 48 Barb. 274, 277, per Leonard, J.

[5] *McFadden* v. *Wallace*, 38 Cal. 51; *Trenor* v. *Central Pacific R. Co.*, 50 Cal. 222.

[6] *Chicago, &c. R. Co.* v. *Adler*, 56 Ill. 345. In this case one of the jurors stated upon the *voir dire* that, in a contest between a railroad company and a citizen, he should "lean against" the corporation, because the company "were able to stand it," and he thought a private individual should "have a little mite the advantage." Such views are very common, but seldom so ingenuously expressed. See farther, *Curry* v. *State*, 4 Neb. 545; *Sam* v. *State*, 13 Smed. & M. 189, 193; *Richey* v. *Missouri, &c. R. Co.*, 7 Mo. App. 581. It has been held that jurors may be asked as to which way they would be inclined to decide the case, if upon hearing the testimony they should find it evenly balanced. *Chicago, &c. R. Co.* v. *Adler*, 56 Ill. 345; *Chicago, &c. R. Co.* v. *Buttolf*, 66 Ill. 347; *Galena, &c. R. Co.* v. *Haslam*, 73 Ill. 494; *Richmond* v. *Roberts*, 98 Ill. 472. In this last case the juror made answer to the above question that in that case he should feel inclined to find for the plaintiff, but upon further examination stated that he had neither formed nor expressed an opinion; that he had no bias or prejudice against either of the parties,

party towards whom the preference exists. A juror is clearly incompetent who would decide in favor of this party, when the evidence preponderates in behalf of neither party.[1]

§ 25. Political Opinions. — On the trial of an indictment at a meeting for the consideration of a public measure, the prosecution challenged two jurors on the ground that they were inhabitants of the town affected by the measure in question, and had taken an active part in opposing the law. Coleridge, J., at *nisi prius* thought that a person who had taken an active part on either side with respect to a measure which had caused so much excitement could not be regarded as an indifferent juror.[2]

§ 26. Opinions which embody Conclusions of Law merely, no Disqualification. — The formation of an opinion which consists in nothing more than a conclusion of law upon facts which have previously been presented to the juror's mind is obviously no disqualification. "On the contrary," said Lomax, J., of the General Court of Virginia, "the court thinks that a knowledge of the law, instead of a disqualification, would be a recommendation of the fitness of the juror. And although a juror may have taken up some misconception of the law of the case, the instruction of the court can be resorted to for correcting his error and affording him a standard by which the law may be ascertained; whereas, in regard to facts, there is no other standard but the opinions of the juror himself." [3]

A good illustration is found in the trial of Callender for the publication of a seditious libel. A juror who had an unequivocal opinion that the book came within the sedition law, but had no opinion as to its authorship, was held to be competent.[4] And,

and knew no reason why he could not sit as an impartial juror and decide the case according to the evidence. The court held the witness competent, distinguishing its opinion in this case from that in *Chicago, &c. R. Co.* v. *Adler*, *supra*. "What was there said," observed Craig, J., "might seem to sustain the position of counsel here; but the juror went further in this case than did the juror in the case cited. . . . We are of opinion such a person is a competent juror." Courts generally, however, will not permit hypothetical questions to be put to a juror upon the *voir dire*, with a view to testing his competency. See *State* v. *Arnold*, 12 Iowa, 479; *State* v. *Davis*, 14 Nev. 439; *State* v. *Leicht*, 17 Iowa, 28; *State* v. *Ward*, 14 La. An. 673; *State* v. *Bennett*, 14 La. An. 651; *State* v. *Bell*, 15 La. An. 114.

[1] *Mima Queen* v. *Hepburn*, 7 Cranch, 290.

[2] *Reg.* v. *Swain*, 2 Lewin C. C. 116; s. c. 2 Mood. & Rob. 112.

[3] *Heath* v. *Com.*, 1 Rob. (Va.) 735; *Pettis* v. *Warren*, Kirby, 426; *Com.* v. *Abbott*, 13 Met. 120; *Hughes* v. *Cairo*, 92 Ill. 339; *Thrall* v. *Lincoln*, 28 Vt. 356. But *contra*, see *United States* v. *Hanway*, 2 Wall. Jr. 139; *Blake* v. *Millspaugh*, 1 Johns. 316.

[4] *Callender's Case*, Wharton, St. Tr. 697.

as stated by Chief Justice Marshall, upon the trial of Aaron Burr, "If, for example, a juror had said that levying an army for the purpose of subverting the government of the United States by force, and arraying that army in a warlike manner, amounted to treason, no person could suppose him on that account unfit to serve on the jury. The opinion would be one in which all must concur."[1]

§ 27. Unless such Opinions indicate Bias. — Such an opinion, however, may be erroneous, and of that fixed and unalterable character that the juror will be plainly disqualified.[2] Thus, in an action against a sheriff for trespass, where the defendant justified under a distress warrant for rent in arrear, issued by the landlord, a juror was properly rejected who belonged to an anti-rent association, who had presided at a meeting of such association, and had expressed the opinion that the landlord had no title to rent, although the laws might enable him to collect it, and that he himself would pay no more rent until the question of title was settled.[3] But the belief that the law under which an action is brought "is a good one," is not even proper evidence for the consideration of the triors upon a challenge to the favor.[4]

Jurors may be examined as to their prejudices against the enforcement of a law under which an indictment has been framed.[5] Thus, where a defendant is on trial for the crime of polygamy, a juror who belongs to the Mormon Church, and believes that polygamy is a direct command from God, and consequently above the laws of man, should be excluded from sitting in the case.[6]

§ 28. Opinion upon Particular Facts involved in the Issue. — To disqualify a juror by reason of his prejudgment of the case to be tried, it is not necessary that he should have formed such judgment upon a consideration of *all* the circumstances involved in the issue. It is a sufficient cause of disqualification that his obnoxious opinion attaches to any *material* fact involved.[7]

The nature of an opinion upon a portion of a criminal case which will disqualify, is well stated in a late decision of the Su-

[1] Burr's Trial, p. 418.

[2] *Com.* v. *Austin*, 7 Gray, 51; *State* v. *Davis*, 14 Nev. 439, 450; *Com.* v. *Buzzell*, 16 Pick. 153.

[3] *Lord* v. *Brown*, 4 Den. 345.

[4] *McNall* v. *McClure*, 1 Lans. 32.

[5] *Pierce* v. *State*, 13 N. H. 536.

[6] *United States* v. *Miles*, 2 Utah, 19.

[7] *Stewart* v. *State*, 13 Ark. 720; *Davis* v. *Walker*, 60 Ill. 452.

preme Court of Mississippi: "This opinion may exist as to a subject so involved in the question of guilt or innocence that it cannot well be separated from it; or at all events it may be on a subject about which the juror's mind is to act in reaching a conclusion, and so intimately associated with the question of guilt or innocence that, in the ordinary experience of mankind, if the fact be as believed to exist by the juror, it will generally determine the main question of guilt or innocence." [1] Or, as stated by Catron, J.: "If the juror is already able to respond to the question, if put to him, so as to satisfy his own conscience, 'Is the prisoner guilty or is he innocent?' then he is incompetent; but if from not being convinced of the existence or non-existence of certain facts he is unable to determine the question, then he is competent." [2]

Upon the trial of an Indian for the murder of a family of settlers, it was held not to be a cause of challenge that the juror believed the single fact that Indians had murdered the family, having no opinion as to the guilt of the accused.[3] Nor in a capital case does a juror necessarily have an opinion upon the guilt or innocence of the accused, who believes that a person has been killed, and in addition to that fact that the person on trial for the crime did the killing. *Non constat* but that the act was done in self-defence, or was accidental.[4]

But cases may, and frequently do, arise where the person convicted of the fact of having done the killing will be convicted of a felonious homicide. These cases are generally those where the connection of the accused with the crime is established by circumstantial evidence, or where the defence is an *alibi*. Cases where the homicide has been committed by a poison, where it has been preceded by an act of burglary, accompanied by robbery, or the

[1] Per George, C. J., in *Brown* v. *State*, 57 Miss. 424, 431; s. c. 10 Cent. L. J. 376. This was an indictment for perjury against one who had testified to a false *alibi* upon the trial of another for arson. The accused had given testimony upon the trial of the latter utterly inconsistent with his guilt. The juror had no doubt of the guilt of the party charged with arson, and was therefore held incompetent to sit upon this trial for perjury. See further upon this point the opinion of Chief Justice Marshall in the trial of Aaron Burr, p. 417.

[2] *Baxter* v. *People*, 8 Ill. 368, 377. See also *State* v. *Bryan*, 40 Iowa, 379.

[3] *Waukonchawneekkaw* v. *United States*, Morris, 332. See, in connection with this case, *Cargen* v. *People*, 39 Mich. 549; *Stewart* v. *People*, 23 Mich. 63.

[4] *Lowenburg* v. *People*, 27 N. Y. 336; s. c. 5 Park. C. R. 414; *O'Brien* v. *People*, 36 N. Y. 276; *Bales* v. *State*, 63 Ala. 30; *State* v. *Thompson*, 9 Iowa, 188. *Contra*, *State* v. *Brown*, 15 Kan. 400.

like, may well follow under this rule. Here the guilt of the prisoner follows, when once the fact of his having done the killing is fixed upon him. An opinion in such a case, that he is the person who committed the act, is tantamount to an opinion that he is guilty of the crime charged in the indictment. But in a case where the subsequent evidence shows that there was no dispute but that the prisoner was the person who did the killing, this rule would not apply, and it would be a mockery of justice to grant a new trial on the ground that a juror was held competent who had stated on his *voir dire* that he held such an opinion. This question, then, must in every case be tested by the evidence disclosed in the subsequent record. The judge will, however, generally be enabled to foresee or conjecture what the evidence will be, and in such a case he will best exercise a sound discretion by rejecting one who holds such an opinion. But even this rule will not apply in all cases, for the facts of the guilt of the person who did the killing may be matters of such public notoriety and universal belief that no intelligent men can be found to act as jurors who have not an opinion upon the subject.

The guilt of a principal is an essential element in the guilt of the accessory; but the guilt of the principal being conceded, it does not necessarily follow that a person charged as an accessory to the crime of the principal is guilty also. Hence the formation and expression of an opinion as to the guilt of the principal has been considered as not affecting a juror's competency to try an accessory.[1] But this was lately denied by the Texas Court of Appeal. This court held that, on the trial of an accomplice, who under the code of Texas is the same as an accessory before the fact at common law, the judge erred in refusing to permit the defendant to question the jurors touching their opinion as to the guilt or innocence of the principal.[2]

In a criminal case, it has been held to be no ground of challenge that the juror has conclusively made up his mind as to the measure of punishment in case of a conviction of the person upon trial.[3] In this connection, too, it must be remembered, as before stated, that courts will not ordinarily sanction the examination of a juror in this form.[4]

[1] *Lloyd* v. *State*, 45 Ga. 57.

[2] *Arnold* v. *State*, 9 Tex. App. 435; s. c. 11 Reporter, 175.

[3] *State* v. *Ward*, 14 La. An. 673; *State* v. *Bill*, 15 La. An. 114, overruling *State* v. *George*, 8 Rob. (La.) 535.

[4] *Ante*, § 24.

In a civil suit, a juror having a positive opinion as to a matter connected with the controversy, which may be of material importance in the final determination of the case, a party challenging on this account must show this to be one of the main questions involved.[1]

In an action upon a policy of life insurance, which contained a provision that if the insured should "die by suicide" the policy should be void, the defendant pleaded that the insured committed suicide by drowning himself; to which the plaintiff replied that the insured was insane at the time he died, and that the death was not his voluntary and intelligent act. Such of the jurors as considered the fact of suicide to be conclusive proof of insanity were successfully challenged for cause.[2] But those who would not consider the fact of suicide as conclusive evidence of insanity in all cases, but only in some, or who would require other and additional evidence to establish the fact of insanity, are not subject to challenge in such a case.[3]

§ 29. An Unqualified Opinion. — A statute of California declares that the opinion which will disqualify must be an "unqualified opinion or belief," "formed or expressed." This rule simplifies the matter very little, as the question at once arises in every case, upon its own facts, "What is an unqualified opinion?" Upon this point Baldwin, J., said: "If, for example, the juror has read or heard a statement of the facts of a case, *this* does not, of itself, under this section disqualify him, for it does not follow that he has either formed or expressed 'an unqualified opinion.' He may not have formed any opinion at all, certainly not an unqualified one. He may have received an impression; but this impression is not enough to disqualify him. A mere suspicion or inclination of the mind toward a conclusion is not enough; the state of the mind must be more decided. He must have reached a *conclusion* like that upon which he would be willing to act in ordinary matters." [4]

Under this statute no distinction can be drawn between the

[1] *Weill* v. *Lucerne M. Co.*, 11 Nev. 200; *Elbin* v. *Wilson*, 33 Md. 135; *Dew* v. *McDevitt*, 31 Ohio St. 139; s. c. 17 Am. L. Reg. 621; *Wischoover* v. *German Mutual Fire Ins. Co.*, 71 Ill. 65; *Hughes* v. *Cairo*, 92 Ill. 339; *King* v. *Dale*, 2 Ill. 513; *Royston* v. *Royston*, 21 Ga. 161; *State* v. *Martin*, 28 Mo. 530.

[2] *Boileau* v. *Life Ins. Co.*, 9 Phila. 218; *Hiatt* v. *Mutual Life Ins. Co.*, 2 Dill. 572, note.

[3] *Hagadorn* v. *Connecticut Mutual Ins. Co.*, 22 Hun, 249.

[4] *People* v. *Reynolds*, 16 Cal. 128.

expression of an unqualified opinion, and the unqualified expression of an opinion. If the form of expression is unqualified, this is sufficient to render the opinion obnoxious to the statute, although it might be shown upon inquiry that the opinion really entertained was qualified in its character.[1]

It has been held under this statute that it matters not to which party the opinion is favorable or unfavorable. A juror cannot be interrogated upon this point. It is enough that the opinion has been formed and expressed. Therefore such a juror having been put upon the jury against the objection of the defendant, it was not necessary, in order to procure a reversal of the judgment for the plaintiff, to show that the juror was prejudiced in favor of the plaintiff.[2] But this rule is too stringent for general application.

§ 30. A Change of Opinion. — Can a juror, after having formed a positive opinion upon the facts to be tried, restore his competency by an avowal upon the *voir dire* that he no longer entertains such an opinion? It is believed that the old authorities furnish no information upon this point. The cardinal rule of the common law as expressed by Lord Coke was that the juror "must stand indifferent as he stands unsworn;" [3] therefore the Texas Court of Appeal concludes that in the investigation of the juror's competency "the inquiry is addressed exclusively to the present condition of the juror's mind," [4] and hence that "it is wholly immaterial what conclusion may have found a lodgment in his mind a month or a year before trial, but the sole question for determination by the judge, who is constituted the trior under our law, is, 'Has the juror a present opinion or conclusion in his mind that would influence his action in finding a verdict?' If it does not clearly appear that he has not, he should be rejected; otherwise, he ought to be adjudged competent. The law recognizes what is manifest in our daily experience; to wit, that few minds are inflexible, and that time and information often work serious modifications in our preconceived

[1] *People* v. *Cottle*, 6 Cal. 227; *People* v. *Edwards*, 41 Cal. 640; *People* v. *Brotherton*, 43 Cal. 530; s. c. 1 Green's Cr. L. 739; *People* v. *Gehr*, 8 Cal. 359; *Ruff* v. *Rader*, 2 Mont. 211. The juror's statement that the opinion is "unqualified" receives weighty consideration. *State* v. *Gillick*, 10 Iowa, 98.

[2] *People* v. *Williams*, 6 Cal. 206; *State* v. *Shelledy*, 8 Iowa, 477.

[3] Co. Litt. 157 *b*.

[4] *Rothschild* v. *State*, 7 Tex. App. 544; *Grissom* v. *State*, 8 Tex. App. 386, 396.

notions, and hence it limits the inquiry as stated. A juror who had formed an opinion, but had discarded it before trial, is equally competent in law with one who had never formed any opinion at all." [1]

But after an avowal of a positive opinion the juror ought not readily to be permitted to gainsay it at the time of the trial. How can the present condition of the juror's mind be more certainly determined than by evidence of the previously expressed opinions of the juror? All other evidence is of a much less satisfactory character, dependent entirely upon the candor with which the juror can conduct the process of introspection, the degree of which must be entirely unknown to the triors of his competency. Therefore the Supreme Court of Tennessee held that the bare statement of the juror that on a former occasion he had expressed a positive opinion as to the defendant's guilt, but that he now had no opinion, was not enough. "The juror's statement at the time of the trial," said McKinney, J., "that he had *no opinion*, standing as it does in this record, wholly unexplained, is inconsistent and absurd, if not incredible. True, his mind may have been disabused of the first impression by subsequent occurrences, in which case his competency might have been restored; but this ought to have been satisfactorily explained." [2]

§ 31. Expressions of Opinion not affecting the Juror's Competency. — A juror's remarks upon the issue to be tried, made after being summoned, although of a grossly improper character and indicative of the strongest bias in favor or against either of the parties, may be explained by him as made in a spirit of levity, or for the purpose of disqualifying himself for service in the case. Under such circumstances the competency of the juror remains unaffected.[3]

[1] *Grissom* v. *State*, *supra*.

[2] *Northfleet* v. *State*, 4 Sneed, 340, 345. It is a gross abuse of discretion for the trial judge, upon the examination of a juror, to confine the counsel to the single inquiry whether the juror can or cannot try the case, and render a verdict under the law as declared by the court and upon the evidence adduced upon the trial, without regard to any previously formed opinions. *People* v. *Woods*, 29 Cal. 635.

[3] *John* v. *State*, 16 Ga. 200; *Moughon* v. *State*, 59 Ga. 308; *Com.* v. *Flanagan*, 7 Watts & S. 415, 421; *Lovett* v. *State*, 60 Ga. 257; *Simms* v. *State*, 8 Tex. App. 230. It was so held in the case of one of the jurors upon the trial of Aaron Burr who admitted as follows: "I met an intimate friend, to whom I observed that I had come to town with a hope of being placed on this jury, and if I were, I would hang Colonel Burr at once without further inquiry." Burr's Trial, p. 423.

A person called as a juror in a trial for a felony, having been challenged, peremptorily quitted the court-house, saying, "It is well I was rejected, for if I were on the jury I would send her the other side of Boston." Before the impanelling was completed the panel of jurors summoned was exhausted, and to complete the twelve, the counsel for the defendant, in ignorance of the remark, consented to this person being put upon the jury. After conviction, upon a motion for a new trial, it was held that this expression was no indication of hostility, prejudice, or a fixed opinion, but due to embarrassment, confusion, and mortification consequent upon the peremptory challenge.[1]

In another case, a juror was shown to have said of one accused of murder, "Damn him, he ought to be hung!" This fact was unknown to the prisoner until after he had been found guilty of murder in the second degree. A new trial demanded upon this ground was refused. It was held that the remark in question did not indicate a deliberate opinion of the prisoner's guilt, but it was a hasty exclamation which any unprejudiced man on hearing of a murder might make. Moreover, it was considered that the verdict supported this construction, because the juror did not decide that the prisoner should be hung.[2]

The contrary, however, was decided by the Tennessee court.[3] A conviction of murder was reversed where it appeared that before the trial one of the jurors had used this identical expression. The court considered the remark to be not a mere loose expression founded upon rumor, but rather a statement in the strongest terms of opinion, conviction, and prejudice. Affidavits of other jurors, made to the effect that the obnoxious juror was favorable to the prisoner, were regarded as not pertinent to the issue, which the court stated to be whether the juror was competent, not what his conduct was after he was taken on the jury.

§ 32. Witnesses as Jurors. — If a juror is supposed to have any information or knowledge respecting the facts of a case which may become material to the decision of such facts by the jury, the proper practice is to put the juror upon the stand to testify as a witness.[4] By this means both parties have the advantage of examining him as to the sources of his knowledge,

[1] *Com.* v. *Hailstock*, 2 Gratt. 564.

[2] *Smith* v. *Com.*, 2 Va. Cas. 6. See also *Kennedy* v. *Com.*, 2 Va. Cas. 510.

[3] *Brakefield* v. *State*, 1 Sneed, 215.

[4] *Rex* v. *Perkins*, Holt, 403; *Hauser* v. *Com.*, 5 Am. L. Reg. N. S. 668.

and its effect upon the deliberations of the jurors can be directed by the court. The oath of a juror obviously forbids that any private information should be for the first time disclosed in the jury-room, after the case has closed, and the jury have retired to consider their verdict.[1]

In some States the fact that one summoned as a juror has also been subpœnaed as a witness in the case constitutes a good cause of challenge.[2] And where this is the law, the juror does not render himself competent by disclaiming all knowledge of the case;[3] nor is the error of putting such persons upon the jury cured by omitting to call them as witnesses.[4]

It is no cause of challenge to a juror that he was examined as a witness on a former trial of the same cause before arbitrators;[5] nor in a criminal case, that on a former trial of the indictment the juror had been called as a witness for the State, to testify against the general character of the prisoner.[6]

§ 33. The Disqualification arising from a Preconceived Opinion removed by Statute. — From the foregoing sections it will be seen that the application of the rule disqualifying jurors because of opinions expressed or formed is frequently a matter of great nicety. Moreover, the present cheap and therefore universal means of disseminating information in regard to crimes of a startling character so fill the reading public with a knowledge of the facts, that to form an opinion in regard to the guilt of accused persons is the almost involuntary operation of intelligent minds. Courts have been frequently driven to the illiterate and hopelessly ignorant portions of the community as ministers of justice. Again and again the public have been confronted with the striking paradox, that the more heinous the crime the less likely the criminal is to be tried by an intelligent jury, and therefore the greater the probability that he will escape punishment.[7]

[1] *Dunbar* v. *Parks*, 2 Tyler (Vt.), 217; *Green* v. *Hill*, 4 Tex. 465; *United States* v. *Fourteen Packages*, Gilp. 236; *Fellows's Case*, 5 Me. 331; *Rondeau* v. *New Orleans, &c. Co.*, 15 La. 160.

[2] *Com.* v. *Jollife*, 7 Watts, 585; *Atkins* v. *State*, 60 Ala. 45; *Commander* v. *State*, 60 Ala. 1; *State* v. *Underwood*, 2 Overton (Tenn.), 92; *Hook* v. *Page*, 1 Overton (Tenn.), 250. But see *Fellows's Case*, 5 Me. 331; *Handy* v. *Call*, 30 Me. 9; *Bell* v. *State*, 44 Ala. 393; *Rondeau* v. *New Orleans Co.*, 15 La. 160.

[3] *West* v. *State*, 8 Tex. App. 19.

[4] *Atkins* v. *State*, 60 Ala. 45.

[5] *Harper* v. *Kean*, 11 Serg. & R. 280.

[6] *Fellows's Case*, 5 Me. 331.

[7] See *People* v. *Bodine*, Edm. Sel. Cas. 36; s. c. 1 Den. 281. In this case the prisoner was indicted in Richmond County, New York, for the murder of her brother's wife and his child; for arson of

This state of affairs is too odious to be of lengthy duration. A revulsion against the prevailing rule has, in some States, found positive expression. In 1872 it was provided by a statute of New York that "the previous formation or expression of an opinion or impression, in reference to the circumstances upon which any criminal action at law is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in reference thereto, shall not be a sufficient ground of challenge for principal cause to any person who is otherwise legally qualified to serve as a juror upon the trial of such action, provided the person proposed as a juror, who may have formed or expressed, or has such opinion or impression as aforesaid, shall declare on oath that he verily believes that he can render an impartial verdict, according to the evidence submitted to the jury on such trial, and that such previously formed opinion or impression will not bias or influence his verdict; and provided the court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror." [1]

his inhabited dwelling-house; for burglary; and for receiving stolen goods. The heinousness of the various crimes (which were all one transaction) attracted universal attention at the time, as well as the various attempts to procure a trial. The prisoner was tried on one of the indictments for murder, in the county of Richmond, and the jury not agreeing were discharged. Another attempt was made to try her upon the same indictment in that county; but this failed because of the impracticability of procuring a jury. The indictments were then all removed into the Supreme Court, and by that court sent down to the New York circuit to be tried. Being arraigned on the indictment for murder, she was convicted; but the judgment was reversed for errors of the circuit judge in disallowing certain questions to be put to the jurors upon challenges to the favor, with reference to their impressions as to the guilt or innocence of the accused. The Supreme Court, in reversing this judgment, declared a rule affording a very wide range of examination as to impressions of guilt, &c. The case had by this time achieved a widespread notoriety in the New York circuit. Upon the second trial an extraordinary spectacle ensued: three weeks were consumed in an effort to obtain a jury, and over six thousand jurors were summoned; about four thousand were tried on challenges, and all set aside except ten. Then the counsel for the accused moved the court to suspend the trial and discharge the jury as far as procured, and grant them the necessary certificate to lay before the Supreme Court, in order to procure a change of venue. The district attorney did not object, and the court granted the motion. The venue was afterwards changed to the county of Orange, where the prisoner was tried and acquitted of the charge of murder. A *nolle prosequi* was then entered on each of the other indictments, and she was set at liberty.

[1] Laws N. Y. 1872, ch. 475, p. 1133. The foregoing, it will be noticed, has reference only to the challenge for principal cause on this account. The challenge to the favor remains unaffected by the act. A weak form of this statute was enacted the year following in Michigan (Laws Mich. 1873, Act. 117, p. 162). It provides that the previous formation or ex-

§ 34. Constitutionality of the New York Statute of 1872. — The constitutionality of this statute was unsuccessfully assailed in the first case where it was brought to the attention of the courts.[1] The ground upon which it was attacked was that it impaired the common law and constitutional right of an accused person to trial by an impartial jury. The Court of Appeals held that it did not. Grover, J., clearly pointed out that the impartiality of the individual juror was carefully hedged about by several circumstances: 1st. The juror's sworn statement that he could lay aside the opinion formed, and render a true verdict according to the evidence; 2d. The judgment of the court as to the juror's ability to do this;[2] 3d. The challenge to the favor, after all. "While the constitution," said he, "secures the right of trial by an impartial jury, the mode of procuring and impanelling such jury is regulated by law, either common or statutory, principally the latter; and it is within the power of the legislature to make, from time to time, such changes in the law as it may deem expedient, taking care to preserve the right of trial by an impartial jury."[3]

§ 35. Construction of this Statute. — In construing the New York statute, the object of the law has (except in a single instance) been kept clearly in view. The statute was designed to be a distinct and radical departure from the rule which has grown up in this country, that a juror who has formed a fixed and settled opinion of the guilt or innocence of a prisoner is subject to a challenge for cause, no matter how or upon what the opinion is founded, and regardless, too, of the prisoner's state-

pression of an opinion, not being positive in its character, or not being based upon personal knowledge of the facts in the case, shall not be a sufficient ground of challenge for principal cause, &c., concluding with the same proviso as in the New York statute. It is difficult to imagine for what reason the Michigan statute was passed. It made no change in the existing law, and has been interpreted as simply declaratory of a previously well-settled rule. *Stephens* v. *People*, 38 Mich. 739; *Ulrich* v. *People*, 39 Mich. 245. See also *Palmer* v. *People*, 4 Neb. 68, 75, construing a similar statute of Nebraska.

[1] *Stokes* v. *People*, 53 N. Y. 164.

[2] A statute is unconstitutional which provides that a juror shall be competent in a criminal case, notwithstanding the formation or expression of an opinion as to the guilt or innocence of the accused, who can say upon oath that upon the law and testimony he can give the accused a fair and impartial trial, the juror's statement being conclusive of his competency. *Eason* v. *State*, 6 Baxter (Tenn.), 466. The mind of the court must be satisfied that the challenged juror is free from bias and prejudice, and not merely that of the juror himself. *Morton* v. *State*, 1 Kan. 468; *Cooper* v. *State*, 16 Ohio St. 328, 332; *People* v. *Woods*, 29 Cal. 135. But see *Thomas* v. *State*, 36 Tex. 315.

[3] To the same effect see *Jones* v. *People*, 2 Col. 351; *Cooper* v. *State*, 16 Ohio St. 328.

ment, upon oath, that he could decide the case fairly and impartially upon the evidence, without bias or prejudice from the opinion previously formed.[1]

The statute was first construed in *Thomas* v. *The People*.[2] The juror objected to in this case had formed an opinion in reference to the guilt of the accused, which opinion would require evidence to remove it. This, it will be seen, was one of the most familiar tests of disqualification under the previous law.[3] But as the juror was able to state that he could decide the case upon the evidence, rendering an impartial verdict, unbiassed by such opinion, the challenge was held to have been correctly overruled. In another case the juror was held to be qualified, although he testified that he had formed and expressed an opinion upon the guilt of the accused, from reading an account of a former trial; that he would commence the trial with an impression on his mind resulting from that opinion, which might influence his verdict contrary to his intention or expectation, although he thought he could decide the case impartially upon the evidence.[4]

On the trial of the negro Chastine Cox for the murder of Mrs. Hull, which lately attracted so much attention, a juror was called who testified upon the *voir dire* that he had read of the case in the newspapers, and had formed a *decided* opinion as to the guilt of the accused which it would require evidence to remove, and that if sworn as a juror he would enter the box with this opinion still existing; that he generally believed what he read in the newspapers if it sounded reasonable, until contradicted; that if accepted as a juror, he did not think he would permit what he had read to affect his judgment; that he verily believed he could decide the case according to the evidence produced in court, and upon that alone; that his opinion was dependent upon the truth of what he had read; that he did not know whether the account was true or not; that there was nothing to keep the opinion in his mind when the trial had begun and evidence had been introduced; that from the statements in the newspapers he believed, in a general way, that the

[1] *Balbo* v. *People*, 80 N. Y. 484, 492.

[2] 67 N. Y. 218.

[3] *Ante*, § 17.

[4] *Phelps* v. *People*, 6 Hun, 401; s. c. 72 N. Y. 334. Under a statute of Nebraska, similar to that of New York, a juror was held to have been properly excluded who, after disclaiming that he had formed an opinion, said he *thought* he could render a fair and impartial verdict, but added, "I might possibly lean a little the other way." *Curry* v. *State*, 4 Neb. 545.

prisoner was guilty. Upon a challenge to the favor this juror was held to be competent.[1]

The liberal construction of this statute received a check in *Greenfield* v. *The People*.[2] In this case, the Court of Appeals, reversing the decision of the Supreme Court,[3] held that one who has formed an opinion or impression from the reading of the report, partial or complete, of the criminatory testimony against a prisoner on a former trial, however strong his belief and purpose that he will decide the case on the evidence to be adduced before him as a juror, and will give an impartial verdict thereon, cannot be readily received as a juror indifferent towards the prisoner and wholly uncommitted.[4]

In the latest case, however, where the court considered a challenge under this statute,[5] *Greenfield* v. *People*[6] was unsatisfactorily distinguished, and it is safe to say that its authority is in some degree qualified. This was an indictment for murder. A juror testified that at the time of the homicide he had read an account of it in the newspapers, which account, he *thought*, was *the testimony taken before the coroner*. From this he *thought* his present opinion in regard to the guilt of the accused was formed. That opinion he stated, in answer to a leading question, to be "positive, clearly marked" and still retained. To the question whether it would require "strong" evidence to remove that opinion, he answered that it would. In another part of his testimony, however, he said that he would believe a newspaper contradiction of what he had read as readily as he did the original account; that he made little distinction between an impression and an opinion, and did not know that he had anything more than an impression in the matter; that while he might have this opinion in his mind, he did not believe it would bias or influence him upon the consideration of evidence in the case, to which he would give full weight and effect. The juror was held to be competent.[7]

[1] *Cox* v. *People*, 19 Hun, 430; s. c. affirmed, 80 N. Y. 500. See also *Manke* v. *People*, 17 Hun, 410; *Balbo* v. *People*, 19 Hun, 424; s. c. affirmed, 80 N. Y. 484; *Pender* v. *People*, 18 Hun, 560.

[2] 74 N. Y. 227.

[3] 13 Hun, 242.

[4] See in connection with this case *Carroll* v. *State*, 5 Neb. 32; *Smith* v. *State*, 5 Neb. 181; *Rice* v. *State*, 1 Yerg. 432; *McGuffie* v. *State*, 17 Ga. 497; *Rollins* v. *Ames*, 2 N. H. 349; *Clore's Case*, 8 Gratt. 606, 619; *Stephens* v. *People*, 38 Mich. 379.

[5] *Balbo* v. *People*, 19 Hun, 424; s. c. 80 N. Y. 484.

[6] *Supra*.

[7] In the Supreme Court it was admitted that several statements of the

The effect of the statute seems to be this: Under the law prior to the statute, a juror who avowed that he had formed or expressed a positive opinion as to the guilt or innocence of an accused person was, by such avowal, rendered incompetent. The law would not listen to any further statement, however confidently made, that notwithstanding such opinion he could give the accused a fair trial. Under the statute this supplementary statement may be made, and if the truth of it is made out to the satisfaction of the court, the juror is no longer subject to a principal challenge upon this score. The statute, then, is based upon the presumption that the juror can shut out from his consideration during the trial all previously formed opinions touching the case. It does not permit him to demand evidence to overcome his bias or preconceived opinions. In short, the juror must, under the statute, as at common law, "stand indifferent as he stands unsworn."

§ 36. Observations upon the Case of Guiteau. — We have now concluded the discussion of the subject of this article. An attempt has been made to examine every adjudicated case of importance which the reports and legal periodicals afford to date. As outlined in the opening section, Guiteau's case will now be briefly noticed.

It is safe to say that no panel of jurors can be brought into court from which to organize a jury in this case, every member of which will not regard Guiteau's crime with horror and detestation. Every good citizen will promptly avow this feeling if questioned thereto upon the *voir dire*. No man need hesitate to do so. The law is not so unreasonable as to disqualify a juror for this cause.[1]

Jurors will also be biassed against the accused personally, and this will be both natural and justifiable. He has been branded over all the country as a vagabond, cheat, thief, and common scoundrel, regardless of the great crime for which he will stand accused. He is, therefore, a notorious offender, to whom this prejudice properly attaches. Therefore, let no juror hesitate to avow an aversion which he honestly feels. It will not affect his

juror, if detached and considered by themselves, would bring the case within *Greenfield* v. *People, supra,* yet considering the whole testimony, the counsel for the accused were held to have failed to establish that the juror was not legally competent. 19 Hun, 424, 427. This view was adopted by the Court of Appeals, 80 N. Y. 484.

[1] *Ante,* § 8.

competency, provided he can, for the time being, lay that aversion out of sight and give the accused a fair trial upon the evidence.[1]

All persons hearing of the assassination of the President and the arrest of Guiteau in his attempted flight must have promptly reached the conclusion that he was the person guilty of the deed. An expression of opinion to this effect, coupled with an execration of the assassin, is but a natural impulse under the circumstances, and carries with it no disqualifying effect.[2]

It is to be remembered that a settled conviction that Guiteau took the life of the President by no means indicates an opinion that he is guilty of the crime of which he will be charged.[3] Who, believing this fact alone, is ready to respond to the question, "Is he guilty of murder in the first degree?" There are other and vital ingredients in the crime entirely disconnected from an opinion upon this point. There is the possibility that the deed may have been accidentally done, or while Guiteau was lawfully defending his own life, and so the act have been without malice.

Finally, the insanity and consequent irresponsibility of Guiteau is a fact which may possibly be established. From the necessity of the case, this defendant will enjoy a full measure of constitutional rights if tried by a jury satisfied at the outset that he took the life of the President, but willing to give him an impartial trial upon the question of malice and his capacity to commit any crime.

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[1] *Ante*, § 11.

[2] *Payne* v. *State*, 3 Humph. 375, and other cases cited, *ante*, § 16; *Smith* v. *Com.*, 2 Va. Cas. 6. At all events, a simple expression of opinion, divested of all that could give it the color of bias or prejudice, that A. B., who has shot and killed C. D. while walking peaceably at a distance, ought to be hung, really embodies merely a conclusion of law, in which all must concur. In substance, it is the statement only of a legal proposition. See *ante*, in the section showing that opinions which embody conclusions of law merely are no disqualification.

[3] *Ante*, § 28.

CONFESSIONS.

THE difference between the law of England and America on the one hand, and that of Germany, France, and other Continental nations on the other, in regard to the method pursued in obtaining evidence against those charged with crime, has often been remarked upon. While the Anglo-American law announces as a first principle that no one shall be obliged to criminate himself, in other countries an important part of the machinery used for the detection of crime consists of tribunals of an inquisitorial character before which supposed offenders are brought for examination and the attempt is made to screw out of them a confession, which, if obtained, is sufficient for a conviction. We are not to discuss now the relative merits of the two contrasted systems, nor to inquire into the reason for the English law, but to remark that the same characteristic of our law appears in its doctrine concerning the admissibility of confessions in evidence. The same "tenderness towards prisoners" that excuses them from testifying against themselves intervenes for their protection when their confessions are sought to be used against them, and prohibits their introduction wherever they were produced by inducements, threats, or promises from those in authority. If so produced they are said to be involuntary. No faith should be given to confession "forced from the mind by the flattery of hope or the torture of fear," it is said; but when one inquires what is considered to be thus "forced" from the mind, the answer is that any degree of influence brought to bear upon the accused renders the confession incompetent, because the law cannot measure the force of the influence used. This, at least, used to be the language of the courts, and is so now in some localities. Accordingly, we find the courts in the early cases going to an absurd length in excluding evidence of confessions. In *R.* v. *Drew*[1] decided in 1837, the magistrate's clerk testified as to what he said to the prisoner: "I told him not to prejudice himself, as what

[1] 8 C. & P. 140.

he said I should take down, and it would be used for him or against him at his trial," and Coleridge held that the confession made thereupon could not be admitted in evidence, saying, "I cannot conceive of a more distinct inducement to a man to make a confession than telling him that what he says may be used in his favor at his trial." That case, however, together with several others following it, were overruled in *R.* v. *Baldry*[1] decided in 1852, and since then the decisions, on the whole, have been more reasonable. In that case, language is used by Parke, B., which is worthy of notice. He said: "Whether it would not have been better to have left the whole to go to the jury, it is now too late to inquire; but I think there is too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame, when I consider what objections have prevailed to prevent the reception of confessions in evidence; and I agree with the observation that the rule has been extended quite too far, and that justice and common sense have too frequently been sacrificed at the shrine of mercy." Similar observations are made by Lord Campbell in the same case, and by Kelly, C. B., in *Reg.* v. *Reeve*.[2] So in *Commonwealth* v. *Knapp*,[3] Morton, J., says: "I have sometimes doubted whether confessions, with the accompanying circumstances, ought not always to be received in evidence." These expressions show some dissatisfaction with the doctrine, firmly established though it is. Practically, however, it is more important to discuss the limits of the doctrine than the policy of it. When a confession is made upon a promise to the accused that he shall be let off or more leniently punished if he will confess, it is plain that the case is within the rule. So if threats are used that it will go harder with him if he does not confess, and thereupon he confesses. But the cases that create embarrassment, and in which the decisions are hardly reconcilable, are those where, without any distinct promise or threat being used, the prisoner is urged to tell the truth or to confess. In an early case, *R.* v. *Garner*,[4] a girl accused of crime was told that it was better for her to speak the truth, and the Court of Criminal Appeal unanimously held the confession inadmissible.

[1] Den. C. C. 430.
[2] 12 Cox, 179.
[3] 9 Pick. 496, 504.
[4] 1 Den. C. C. 329.

In Bishop on Criminal Procedure[1] it is said that if the prisoner is told by one in authority that he "better confess," the confession is rejected as not voluntary according to all opinions, and in case of an exhortation to tell the truth, whether the confession should be excluded is made to depend upon whether the prisoner "understands that confession is the real thing requested, the speaker assuming the truth to be guilt." We must be permitted, however, to question the first of these propositions. For in *Commonwealth* v. *Morey*,[2] the prosecutor said to the prisoner that it was better for all concerned, in all cases, for the guilty party to confess, and the confession thereupon made was held admissible; and in *Commonwealth* v. *Sego*[3] an employer said to his clerk, who was charged with larceny, "I should like to have you make a clean breast of this matter," and the confession was admitted, Lord, J., saying: "In this case there was no promise or threat; there was at most only an implied belief that he was guilty, and a desire that he should tell what he knew." In *Commonwealth* v. *Mitchell*[4] the officer arresting the accused said to him, upon his denying the occurrence of events relating to the charge, "The more lies told in such cases the deeper one gets into the mud," whereupon the prisoner admitted the facts in question. The admission was allowed to be shown in evidence. On the other hand, among the very recent cases, the case of *Lacey* v. *State*[5] goes as far in excluding confessions as Bishop's rule would require, and perhaps further. There the prosecutor, whose house had been entered and chairs taken therefrom, meeting the defendant, said to him, "You had better return the chairs;" to which the latter replied that "he would." The evidence of this was rejected.[6] A recent case in California supports Bishop's view.[7]

In *State* v. *Whitfield*[8] the employer of defendant said to the latter, "I believe you are guilty. If you are, you had better say so; if you are not, you had better say that," and the confession was held to be involuntary. In a case almost precisely similar, however, the defendant being importuned to confess if guilty, but advised not to confess if innocent, the confession was admitted.[9]

[1] p. 1233.
[2] 1 Gray, 461.
[3] 125 Mass. 210.
[4] 117 Mass. 431.
[5] 58 Ala. 385.
[6] See, however, *Grant* v. *State*, 55 Ala. 201.
[7] *People* v. *Barric*, 49 Cal. 342.
[8] 70 N. C. 356.
[9] *Meinaka* v. *State*, 55 Ala. 47.

It seems to us that the Massachusetts cases which we have cited put the correct interpretation upon the rule in question, and that merely advising or urging a suspected person or a prisoner to confess should not be considered as offering an inducement to him if he will confess, or holding out a threat if he will not. The entreaty in such cases is based upon a supposition that the person is guilty, and would not be intended or understood as urging the person to confess irrespective of his guilt or innocence. It should not therefore be considered as calculated to elicit anything but the truth, and if only calculated to elicit the truth, of course there is no reason to reject the confession thereby obtained. We do not see, therefore, why in any case a confession should be regarded as involuntary when made in consequence of an exhortation to tell the truth. Evidently it would not be so held in Massachusetts. In *Reg.* v. *Reason*,[1] Keating, J., says: "The real question is whether there has been any threat or promise of such a nature that the prisoner would be likely to tell an untruth, from fear of the threat, or hope of profit from the promise." This seems to us to state the rule with more accuracy than it is generally stated, and to bring into prominence a consideration that is too often apparently ignored, that is, whether the accused would be likely to tell an untruth because of the conduct and language of the persons in authority.

It may be convenient for general readers to know that citations of nearly all but the most recent authorities upon these points may be found in Bishop on Criminal Procedure, page 1224; 1 Greenleaf on Evidence (May's ed.) §§ 214–229; Stephen's General View of the Criminal Law of England, page 319; Roscoe's Criminal Evidence (7th Am. ed.), page 38; Heard's Leading Criminal Cases. *Reg.* v. *Baldry*. We therefore cite here only some of the most recent cases: *Flagg* v. *People*, 40 Mich. 706; *State* v. *Johnson*, 30 La. An. Pt. 2, 881; *Self* v. *State*, 6 Baxter (Tenn.), 244; *Earp* v. *State*, 55 Geo. 136; *State* v. *Chambers*, 39 Iowa, 179; *State* v. *Hagan*, 54 Mo. 192; *McNeezer* v. *State*, 63 Ala. 169; *McCulloch* v. *State*, 49 Ind. 109.

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[1] 12 Cox, 228.

GENERAL NOTES.

MORALS AND LAWS FOR CRIME.

WHATEVER becomes of Guiteau, it is to be hoped that his trial will be a guide to the profession of the law, and an honor to the nation. We share the popular impression that he deserves hanging; but the hanging which we mean is a regular execution, after a fair trial, conviction and sentence, and all strictly according to law. We confess that when we believe a person to be morally guilty of a great wrong we like to have him punished. We mean punishment as an infliction of pain for guilt. Right or wrong, wise or foolish, this is a fact in our case, and we believe it to be right and wise. Even criminals who have sufficient strength of mind will sometimes own their deserts. We believe, moreover, that most people of sense feel in the same way. Indeed, the ablest and prevailing theologies of the world stimulate this feeling by elaborate dogmas. The Bible puts it upon the Lord, but it is there. In literature sometimes it bears the title of "poetic justice." Certainly natural science in the idea of the struggle for existence regards this feeling as a mighty element in that struggle. It is in the roots of human nature, and we see no evidence that indignation or revenge will ever be exhausted. Intelligence, knowledge, and character affect the quality and degrees, and shape the forms which these sentiments assume, but Christendom has never forsaken either the practice or the principle of revenge. The feeling is an inexpugnable fact in human nature. The question is not whether we shall feel revenge or not; the question is, what shall we do when we feel it? The best morality requires both that the feeling be kept within the control of the person who feels it, and that his acts shall be tempered with justice and benevolence. This rule is necessarily vague, but the lives of the best men show what it means in practice.

Our laws demand that the acts of each of us, whether coming from revenge, justice, or benevolence, shall not transgress certain

fixed lines of legal behavior. We are required to keep within regular courses of discipline found to conduce on the whole to the health of the nation, as well as to the rights of every individual, rich or poor, good or bad, high or low, President or assassin. If Garfield had lived he would have used the whole power of his great office, if necessary, to make sure that his assassin should be tried according to the laws of that Government which "still lives."

The object of the so-called punishment of criminals is always to protect society by preventing them and deterring others from injuring it further; sometimes it is also to reform the criminal, and sometimes it is to express the moral indignation of society by inflicting punishment because of imputed blame. Whether the legislatures which make criminal laws expressly debate the moral motives of criminals or not, the people support the exercise of criminal laws because they do consider the motives of the persons who are tried under such laws. Historically, and in the actual present state of civilized or barbarous races, no exclusive theory accounts for the reaction of any society against the persons whom it selects as criminals.

Capital punishment considered with reference to insane criminals is the focus where theories of the nature of criminal law meet their most critical tests. Whether criminal law logically requires any doctrine of sin in a theological sense, or any element of spiritual blame for evil character in any moral sense, it seems to be true that society at large almost always, if not always, does have some such feelings whenever a sane criminal is punished by the law; and that there is no prospect that society will ever be without such feelings. It is the existence of such sentiments of blame towards sane criminals which is one of the chief reasons for the distinction in the law in favor of insane criminals. We excuse because we blame. People in general feel that they cannot morally blame a madman for mad acts, as much as a sane man for malicious acts. Hence the popular feeling leads, whether logically or not, to indulgent laws for the insane. If the counsel for Guiteau properly claim insanity as a defence upon legal evidence, neither the counsel nor honest witnesses are to be sneered at by anonymous or other critics whose freedom of speech is protected by the civilization which makes us give every devil his due.

The newspapers have done something and can do much more, towards checking the sporadic impulses to lynch Guiteau. We have read with regret an indulgent paragraph here and there making easy-going excuses for persons who attacked or threatened others for some imprudent criticism or abuse of the late President. If there is ever a time, this is no time for lawlessness of the monstrous or the petty sort. The American people have been for three months in a most uncommon state of exalted feeling. It has been expressed in ways singularly genuine and pure. The nation is committed to a high standard of character. Now comes the test in action. The man the people loved is no longer in danger. Alas! he is dead and sacredly buried. The man the people hate is now to be dealt with. But the nation asks no assassin or drunken fool to do its business here. Citizens are not to return from Garfield's funeral to follow the example of Guiteau. He is to be tried, not according to his ways, but according to the character of the man he killed, and according to the laws of the people who honor their dead chief by keeping the life of his murderer in legal jeopardy alone.

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THE REVISED STATUTES OF THE UNITED STATES. THE FIRST AND SECOND EDITIONS.

SOME questions which are being asked about the Revised Statutes may be answered by the following extract from the learned opinion of Judge Richardson in the case of *Wright* v. *United States*, 15 Court of Claims Reports, 80 (a head-note of which we published in the *American Law Review* for March, 1880, Vol. XIV. p. 246, from the *Washington Law Reporter*, of 9 February, 1880).

"This case is founded upon transactions which took place after the passage of the Revised Statutes, and must be determined by the law as there found, except so far as it may have been altered by subsequent legislation applicable to the matters now in controversy.

"Counsel have cited the earlier acts of Congress, and rested their arguments mostly thereon, as though they were still in force. It was claimed on the part of the defendants that the Revised Statutes, constituting a revision of the previous legislation, are only *prima facie* evidence of the existing law, evidence which may be overcome by showing that the revision in any particular under consideration is not a correct reproduction of the former statutes. This is an entirely erroneous view of Congressional legislation.

"To those persons who are not made familiar with the subject by frequent reference to the statutes, it is not strange that much difficulty is experienced in ascertaining the force and effect of the Revised Statutes and the two publications known as the first and second editions. For convenient future reference, as well as for the purposes of the decision in this case, we will present some explanations which may be useful to those who may hereafter have occasion to consult the statute law.

"The Revised Statutes are an act of Congress, duly passed by the Senate and House of Representatives, approved by the President, received by the Secretary of State and deposited in the State Department, where alone the originals of all laws of the United States are preserved.[1] They were approved and became the law June 22, 1874. In section 5595 it is enacted that they 'embrace the statutes of the United

[1] Rev. Stat. § 204; Act Dec. 28, 1874, 18 Stat. ch. 9, p. 294.

States, general and permanent in their nature, in force on the first day of December, one thousand eight hundred and seventy-three, as revised and consolidated by commissioners appointed under an act of Congress.'

"It was no doubt the desire and understanding of Congress that the revision should generally reproduce and express the pre-existing laws so far as it was practicable to do so. But it is well known that in the multiplicity of statutes to be revised, the ambiguity of the language of many of them, and the great difficulty and embarrassment encountered in determining the effect of legislation upon earlier acts of the same subjects, the commissioners made numerous errors and omissions. While the act was under consideration by the House of Representatives and the committee on the revision of laws, many changes were made in the language of the commissioners' report, which in some instances may also have altered the law. As early as February 18, 1875, an act was passed entitled 'An act to correct errors and to supply omissions in the Revised Statutes of the United States';[1] and on the 27th of February, 1877, another was passed entitled 'An act to perfect the revision of the statutes of the United States, and of the statutes relating to the District of Columbia.'[2] By these and other acts several hundred errors and omissions have been corrected. There still remain, however, in the revision, many alterations of former laws, which Congress have never yet seen fit to disturb.

"But whether or not the revision correctly reproduced the pre-existing statutes in any particular case, the Revised Statutes became the law of the land on the 22d of June, 1874, when they were enacted by Congress and approved by the President, and they must so continue until altered by the same legislative power that created them. The pre-existing laws thus revised are repealed and no longer in force. Section 5596 declares expressly that 'all acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof, all parts of such acts not contained in such revision having been repealed or superseded by subsequent acts, or not being general or permanent in their nature.'[3]

"In case of ambiguous language in the Revised Statutes, or uncertainty as to the true construction to be given to the words of any section, previous acts on the same subject may be referred to and

[1] 18 St. L. 316, ch. 80.

[2] 19 St. L. 240, ch. 69.

[3] *Holmes* v. *Wiltz*, 11 La. Ann. 446; *United States* v. *Hammond*, 2 Wood, C. C. R. 203; *Hann* v. *United States*, 14 C. Cls. R. 305; *Boucicault* v. *Hart*, 12 Blatch. 52; *Bowen* v. *United States*, 14 C. Cls. R. 162; affirmed on appeal, 100 U. S. 508.

examined for light on the object and intent of Congress as shown by the course of legislation, in the same manner as statutes *in pari materia* relating to the same subject may always be taken, compared, and construed together. But when the language is clear, the latest act, as expressing the latest will of Congress, must govern and must supersede the re-existing legislation inconsistent therewith.[1]

"As to the printed publications, the first edition is a transcript of the original Revised Statutes preserved in the Department of State, and is *prima facie* evidence thereof. If, however, the correctness of the printed copy is drawn in question, the original is the only conclusive evidence of the exact text of the law.

"The second edition is neither a new revision nor a new enactment, but is only a new publication. It is a compilation containing a copy of the original Revised Statutes, like the first edition, with certain specific alterations and amendments made by subsequent enactments of the Forty-third and Forty-fourth Congresses, incorporated according to the judgment and discretion of the editor, under authority of the law providing for his appointment.[2] The editor had no power to change the substance or alter the language of the revision, nor to correct any errors or supply any omissions. The whole text of the Revised Statutes, as published in the first edition, is preserved; but where, by the specific amendments made by the two Congresses mentioned, sections or parts of sections were repealed, those repealed provisions are printed in Italics and included in brackets; and where, in like manner, by legislative enactment, words were required to be added or inserted, they are incorporated in their proper places in ordinary Roman letters, and are also enclosed in brackets.

"Section 79, referred to in the argument of this case, illustrates the manner in which the second edition was edited. In the original, and of course in the first edition, that section stood thus: —

"'SEC. 79. After the fourth day of March, eighteen hundred and seventy-five, no money shall be paid from the Treasury for the publication of the laws in newspapers.'"

"The *Act of February* 18, 1875, ch. 80,[3] provided that 'section seventy-nine is amended by striking out in the second line the words, "no money shall be paid from the Treasury for," and adding, at the end of the section, the words "shall cease."' The editor incorporated the two together, thus: —

"'SEC. 79. After the fourth day of March, eighteen hundred and seventy-five [*no money shall be paid from the Treasury for*] the publication of the laws in newspapers [shall cease].'"

[1] *Bradshaw* v. *United States*, 14 C. Cls. R. 78; *Hann* v. *United States*, 14 id. 305, and other cases above cited.

[2] Act March 2, 1877, ch. 82, 19 Stat. L. 268.

[3] 18 St. L. 317.

"Omitting the words in Italics, this section expresses the law as it has stood since February 18, 1875, when the amendment was enacted.

"The act for the preparation and publication of the second or new edition of the Revised Statutes provides that 'the printed volume shall be legal evidence of the laws therein contained in all the courts of the United States and of the several States and Territories, but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by Congress since the first day of December, eighteen hundred and seventy-three.'[1]

"In the second edition, unlike the first, the statutes are preceded by the Declaration of Independence, the Articles of Confederation, the Ordinance of 1787 for the government of the Northwestern Territory, and the Constitution of the United States, with notes and references to judicial decisions and an analytical index to the same. They are followed by an appendix, containing the acts providing for the revision and publication of the statutes, the act of 1874 reducing salaries which had been increased by the act of 1873, with tables showing the amount of each salary affected thereby, before and after the passage of the act, and a reference index noting where each section of pre-existing statutes are reproduced in the Revised Statutes. The general index is entirely new, and is constructed on a wholly different plan from that to the first edition."

[1] Act March 2, 1877, ch. 82, 19 Stat. L. 268, as amended by Act March 9, 1878, ch. 26, 20 Stat. L. 27.

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